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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DEN-MAT HOLDINGS, LLC,

Plaintiff/Counter-Defendant,

v.

CAO GROUP, INC.,

Defendant/Counter-Plaintiff.

Case No.: 2-18-cv-6358-CAS-JEM

CAO'S REPLY STATEMENT TO DENMAT'S RESPONSES TO CAO'S STATEMENT OF UNCONTROVERTED FACTS

Hearing Date: July 29, 2019
Hearing Time: 10:00 a.m.
Judge: Hon. Christina A. Snyder
Place: Courtroom 8D

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Pursuant to Local Rule 56-1, Defendant and Counterclaim Plaintiff CAO GROUP, INC. ("CAO") submits the following Reply Statement to the Responses filed by Den-Mat Holdings, LLC ("DenMat") to CAO's Statement of Uncontroverted Facts.

Uncontroverted Fact	**DenMat's Response**	**CAO's Reply**
1. In 2015, CAO sued Den-Mat Holdings, LLC ("DenMat") for patent infringement over certain patents related to products sold by DenMat ("the Patent Lawsuit"). The action was stayed while the United States Patent and Trademark Office ("USPTO") conducted a reexamination of one of the patents in question, which it completed in July 2017, verifying CAO's patent rights. DenMat Compl. at 2:11-16; CAO Answer and Countercl. at 10:10-22.	Undisputed.	**The fact is established.**
2. In November 2017, DenMat and CAO entered two agreements: (i) a Nonexclusive Patent License ("the License Agreement"); and (ii)	Disputed; the $800,000 in payments were not based on an "anticipated judgment" CAO would have received against DenMat in the Patent Lawsuit." The $800,000 in payments were in consideration for CAO's	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary**

Uncontroverted Fact	DenMat's Response	CAO's Reply
a Manufacturing and Service Agreement ("the Manufacturing Agreement"). The parties entered these two agreements to settle the Patent Lawsuit, and the $800,000 license issue fee DenMat agreed to pay under the License Agreement was based on the anticipated judgment CAO would have received against DenMat in the Patent Lawsuit. DenMat Compl. at 2:21-27; CAO Answer and Countercl. at 10:27 – 11:3; Declaration of Densen Cao ("CAO Decl.") ¶ 3, Ex. 1 (License Agreement) and Ex. 2 (Manufacturing Agreement).	supplying DenMat with the lasers and laser tips under the Initial Purchase Order, which had a value of $724,000. Support: DEN 00001-00021 (Section 7.1) ("[CAO] will provide these quantities of Products in the Initial Purchase Order at no cost to DENMAT.") (attached to Tiberi Decl. at Exh. 10); DEN 05200-DEN 05201 (attached to Tiberi Decl. at Exh. 10); Cao Depo. at 48:23-49:24, 156:16-23 (attached to Tiberi Decl. at Exh 1).	**Judgment, nor supported by the evidence.** **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO in consideration for the license that CAO granted to DenMat under the License Agreement.** Dkt. No 55-7, Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1. **The Manufacturing Agreement says nothing about the $800,000 License Issue Fee or any other obligation that DenMat owes under the License Agreement.** Dkt. No 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
3. In entering the Manufacturing Agreement, CAO and	Disputed as to "calculated to net CAO a profit on each product sold"; DenMat of what net	**The fact is established. DenMat's attempt to create a disputed issue is**

Uncontroverted Fact	DenMat's Response	CAO's Reply
DenMat desired that CAO would manufacture the products addressed in the Manufacturing Agreement exclusively for DenMat, once the products were ready for production by CAO, at which point CAO would sell the products to DenMat at fixed prices which were calculated to net CAO a profit on each product sold. CAO Decl., ¶ 3, Ex. 2, Recital F and § 5.2.	profit, if any, and when, CAO targeted; DenMat had no knowledge of CAO's volume buying power for laser components, internal business model, profit targets, manufacturing efficiency, or any other factors CAO may have considered in negotiating the terms of the contract. Support: Casper Depo. at 91:13-92:2, 129:21-130:3, 251:2-10 (attached to Tiberi Decl. at Exh. 4); Cao Depo. at 96:4-13 (attached to Tiberi Decl. at Exh. 1).	**neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat admits that the objective of the parties was not to enter an agreement that would cause CAO to suffer a loss, but to enter an agreement that was mutually beneficial.** Dkt No. 55-9, Kopp Decl. ¶ 8, Ex. L (Cartagena Depo. 161:18-25 to 162:2.). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
4. By its terms, the Manufacturing Agreement is to be governed, construed and enforced exclusively in accordance with the laws of the State of California and the laws of the United States of America.	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
CAO Decl., ¶ 3, Ex. 2, § 13.5.		
5. Section 3.1 of the Manufacturing Agreement requires DenMat to provide all the information and materials that CAO would need to make the products, and further requires DenMat to pay for any necessary tooling. CAO Decl., ¶ 3, Ex. 2, § 3.1.	Disputed as mischaracterizes Section 3.1; the document speaks for itself and does not state that DenMat is required to "provide all the information and materials that CAO would need to make the products." Support: DEN 00001-00021 (Section 3.1) (attached to Tiberi Decl. at Exh. 10).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
6. Section 4.1 of the Manufacturing Agreement requires CAO to use commercially reasonable efforts to develop and deliver products within three (3) months of signing the Manufacturing Agreement, but further acknowledges that this timeline is an estimate and may take more or less time depending on many factors. CAO Decl., ¶ 3, Ex. 2, § 4.1.	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
7. Under Section 4.2 of the Manufacturing Agreement, DenMat had an option to require CAO to purchase DenMat's Existing Inventory of components at DenMat's material cost, plus four percent (4%), or at the then current fair market price of equivalent component inventory, whichever is less. CAO Decl., ¶ 3, Ex. 2, § 4.2.	Undisputed.	**The fact is established.**
8. If DenMat exercised its option under Section 4.2 of the Manufacturing Agreement, CAO would be prohibited from purchasing components elsewhere until DenMat's existing inventory was consumed. CAO Decl., ¶ 3, Ex. 2, § 4.2.	Undisputed.	**The fact is established.**
9. Under Section 4.3 of the Manufacturing Agreement, if CAO "fails to timely supply all or substantially all of two (2) or more	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
Purchase Orders," and is unable to cure within ten (10) days, then this shall be considered a material breach committed by CAO, "unless CAO's failure to timely supply is caused by [DenMat]." CAO Decl., ¶ 3, Ex. 2, § 4.3.		
10. Under Section 7.1 of the Manufacturing Agreement, DenMat was to issue an "Initial Purchase Order" of following quantity after completion of manufacturing logistics between DenMat and CAO: 150 Units NV laser kits, 150 Units SOL laser kits, and 200,000 laser tips. CAO Decl., ¶ 3, Ex. 2, § 7.1.	Undisputed.	**The fact is established.**
11. Under Section 7.2 of the Manufacturing Agreement, DenMat was to allow CAO to deliver all the products under the Initial Purchase Order, then wait an additional thirty days, then commence	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
ordering additional products from CAO in lower minimum quantities. CAO Decl., ¶ 3, Ex. 2, § 7.2.		
12. Under Section 9.5 of the Manufacturing Agreement, CAO agreed to manufacture the products in accordance with DenMat's specifications, drawings, and technical requirements, using approved vendors and components; and agreed not to change any bills of materials, vendors, or work instructions without prior written approval of DenMat. CAO Decl., ¶ 3, Ex. 2, § 9.5.	Undisputed.	**The fact is established.**
13. Section 13.7 of the Manufacturing Agreement requires that any attempted modification of the Manufacturing Agreement is not effective unless it is made in a writing executed by both CAO and DenMat.	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
CAO Decl., ¶ 3, Ex. 2, § 13.7.		
14. Section 13.7 of the Manufacturing Agreement further states that no standard terms on any purchase order or other documentation of DenMat shall be binding on CAO unless separately agreed to by CAO as a modification of the Manufacturing Agreement. CAO Decl., ¶ 3, Ex. 2, § 13.7.	Undisputed.	**The fact is established.**
15. Section 4.1 of the License Agreement requires DenMat to pay CAO a License Issue Fee of $800,000 in consideration for the license CAO granted to DenMat to use CAO's patents, with the first payment due within five (5) days of execution of the License Agreement, in the amount of $200,000. CAO Decl., ¶ 3, Ex. 1, § 4.1	Disputed; the $800,000 in payments were not based on an "anticipated judgment" CAO would have received against DenMat in the Patent Lawsuit." The $800,000 in payments were in consideration for CAO's supplying DenMat with the lasers and laser tips under the Initial Purchase Order, which had a value of $724,000. Support: DEN 00001-00021 (Section 7.1) ("[CAO] will provide these quantities of Products in the Initial Purchase Order at no cost to DENMAT."), DEN05200-DEN05201 (attached to Tiberi Decl. at Exh. 10); Cao Depo. at 48:23-49:24, 156:16-23	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO in consideration for the license that CAO granted to DenMat under the License Agreement.** Dkt. No 55-

Uncontroverted Fact	DenMat's Response	CAO's Reply
	(attached to Tiberi Decl. at Exh 1.)	7, Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1. **The Manufacturing Agreement says nothing about the $800,000 License Issue Fee or any other obligation that DenMat owes under the License Agreement.** Dkt. No 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
16. Section 4.2 of the License Agreement requires that DenMat shall pay CAO a royalty of ten percent (10%) of DenMat's net sales price for the products DenMat sells which use CAO's patents, beginning on January 1, 2018 and continuing until the patents expire. CAO Decl., ¶ 3, Ex. 1, § 4.2.	Disputed as mischaracterizes the document; the document speaks for itself and Section 4.3 specifically exempts three categories of products from a royalty obligation, including any products sold by DenMat that are purchased from CAO: **Royalty Exempt Products.** The following products are exempt from royalties: (1) products sold by LICENSEE that are purchased from LICENSOR; (2) Products (as defined in the OEM Agreement) sold by LICENSEE until the First Delivery; (3) Products (as defined in the OEM Agreement) that LICENSEE makes for itself or has a third party make for it due to LICENSOR's uncured material breach of the OEM Agreement; and (4) all products sold by LICENSEE after it achieves the Purchase Threshold (as defined in the OEM Agreement). Support: DEN 00022-00035 (Section 4.3) (attached to Tiberi Decl. at Exh. 10).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
17. On February 27, 2018, CAO received six purchase orders from DenMat. CAO Decl., ¶ 4, Ex. 3.	Disputed as mischaracterizes the Initial Purchase Order; the Initial Purchase Order was comprised of different quantities over multiple delivery dates, which is common in a manufacturing and supply agreement; the Initial Purchase Order had the correct quantities for Products under Section 7.1 of the Manufacturing Agreement. Support: CAO 002676-002684 (attached to Tiberi Decl. at Exh. 9).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
18. The six purchase orders CAO received on February 27, 2018 were the only purchase orders that CAO received from DenMat, and CAO never received a single purchase order from DenMat ordering "150 Units NV laser kits, 150 Units SOL laser kits, and 200,000 laser tips" as required to meet the definition of the Initial Purchase Order under Section 7.1 of the Manufacturing Agreement.	Disputed as mischaracterizes the Initial Purchase Order; the Initial Purchase Order was comprised of different quantities over multiple delivery dates, which is common in a manufacturing and supply agreement; the Initial Purchase Order had the correct quantities for Products under Section 7.1 of the Manufacturing Agreement. Support: CAO 002676-002684 (attached to Tiberi Decl. at Exh. 9).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
CAO Decl., ¶ 5.		
19. Part of the manufacturing logistics phase, which Section 7.1 of the Manufacturing Agreement required the parties to complete before DenMat issued the Initial Purchase Order, was a process validation. CAO Decl., ¶ 6; Declaration of Nathan J. Kopp ("Kopp Decl."), ¶ 5, Ex. A (Deposition of David Casper ("Casper Depo.") 145:8-25 to 146:1-9).	Disputed because the parties did complete manufacturing logistics as evidenced by CAO's manufacturing DenMat's lasers (but they did not pass validation); also the deposition excerpt cited as support does not provide support because the non-lawyer deponent was asked to make a legal conclusion as to the legal definition of "manufacturing logistics," which is an undefined term in a contract. Support: Casper Depo. at 145:11- 146:4; 168:21-169:7 (attached to Tiberi Decl. at Exh. 4).	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the evidence.** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), admits that the manufacturing logistics phase was not completed because the parties did not complete the process validation. He testified: "As it clearly states in Section 7.1, the initial purchase order is to be issued after the manufactured initial logistics were completed, which includes process validation to your point, and we had not gotten there yet."** Dkt. No. 41-16, Kopp Decl. 6/24/19 (Casper Depo. 153:24-154:3). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
20. CAO and DenMat never completed the process validation. CAO Decl., ¶ 7; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 55:13-25 to 56:1-6, 60:11-25 to 61:1-20); Kopp Decl., ¶ 6, Ex. B (Deposition of Robert Cartagena ("Cartagena Depo.") 235:7-9); Kopp Decl., ¶ 7, Ex. C (Deposition of Nicholas Gonzales ("Gonzales Depo.") 196:11-13).	Undisputed.	**The fact is established.**
21. Because CAO and DenMat never completed the process validation, they never completed manufacturing logistics. CAO Decl., ¶ 8; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 153:22-25 to 154:1-3).	Disputed because the parties did complete manufacturing logistics as evidenced by CAO's manufacturing DenMat's lasers (but they did not pass validation); also, the deposition excerpt cited as support does not provide support because the non-lawyer deponent was asked to make a legal conclusion as to the legal definition of "manufacturing logistics," which is an undefined term in a contract. Support: Casper Depo. at 145:11- 146:4; 168:21-169:7 (attached to Tiberi Decl. at Exh. 4).	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the evidence.** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), admits that the manufacturing logistics phase was not completed because the parties did not complete the process validation. He testified: "As it clearly states in Section 7.1, the initial purchase order is to be issued after the manufactured**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		initial logistics were completed, which includes process validation to your point, and we had not gotten there yet." Dkt. No. 41-16, Kopp Decl. 6/24/19 (Casper Depo. 153:24-154:3). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact.**
22. CAO was not authorized to make any products for DenMat to sell to customers until the process validation was successfully completed. CAO Decl., ¶ 9; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 55:13-25 to 56:1-6, 60:11-25 to 61:1-20).	Undisputed.	**The fact is established.**
23. CAO was not authorized to build or deliver products to fill any DenMat purchase order until the parties successfully completed the process validation. CAO Decl. ¶ 10;	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 212:22-24); Kopp Decl., ¶ 7, Ex. C (Gonzales Depo. 183:6-10); Kopp Decl., ¶ 5, Ex. A (Casper Depo. 192:13-25 to 194:1-4).		
24. On February 26, 2018, DenMat's Chief Operating Officer, Robert Cartagena, had sent an e-mail to DenMat personnel which included the text of Section 7.1 of the Manufacturing Agreement and the statement: "We need to issue the Initial Purchase Order as outlined in Section 7." Kopp Decl. ¶ 8, Ex. D.; Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 180:11-20).	Undisputed.	**The fact is established.**
25. David Casper, testifying on behalf of DenMat, stated that he does not specifically know why DenMat issued multiple purchase orders instead of the Initial Purchase Order	Disputed as incomplete; the context of the cited deposition excerpt is as follows: "Q. Right. Do you know why Den-Mat issued multiple purchase orders instead of the initial purchase order as defined in the manufacturing agreement?	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the**

Uncontroverted Fact	DenMat's Response	CAO's Reply
as defined in the Manufacturing Agreement. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 158:19-25).	A. I don't know specifically. It's -- they are all blanket purchase orders for one product over a given period of time with multiple deliveries, which is very consistent with how we buy products." Support: Casper Depo. at 158:18-25 (attached to Tiberi Decl. at Exh. 4).	**evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
26. According to DenMat, the six purchase orders that DenMat issued were treated by the parties as one Initial Purchase Order. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 160:21-25 to 161:1-20).	Disputed as misleading; the deponent also testified that the Initial Purchase Order included "multiple separate purchase orders." Support: Casper Depo. at 159:1-5 (attached to Tiberi Decl. at Exh. 4).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
27. DenMat admits that DenMat was to pay for tooling under the Manufacturing Agreement. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 217:8-11).	Disputed as incomplete; the document speaks for itself; the full context is "If there is a tooling needed, DENMAT agrees to pay such tooling fee." Support: DEN 00001-00021 (Section 3.1) (attached to Tiberi Decl. at Exh. 10).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		supported by the evidence. **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
28. To enable CAO to make the products under the Manufacturing Agreement, DenMat needed to provide CAO with all the information and specifications for the products. CAO Decl., ¶ 12; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 64:5-14).	Disputed as mischaracterizes Section 3.1; the document speaks for itself and does not state that DenMat is required to "provide all the information and materials that CAO would need to make the products." Support: DEN 00001-00021 (Section 3.1) (attached to Tiberi Decl. at Exh. 10).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
29. David Casper, testifying on behalf of DenMat, stated that he does not know whether, as of March 2018, DenMat had provided CAO with all of the material specifications CAO needed to build DenMat's lasers.	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
Kopp Decl., ¶ 5, Ex. A (Casper Depo. 167:24-25 to 168:1-20, 169:16-25 to 170:1-5).		
30. According to DenMat, CAO continued to request information from DenMat, through May 24, 2018. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 167:24-25 to 168:1-20, 169:16-25 to 170:1-5).	Disputed as misleading; the deponent in the excerpt cited by CAO also testified that he "can't speak to what any those of communications were." Support: Casper Depo. at 170:2-12 (attached to Tiberi Decl. at Exh. 4).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
31. DenMat trusts the estimate of Nicholas Gonzales, its Director of Operations, for when DenMat provided CAO with all the information CAO needed to build DenMat's lasers. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 214:8-12).	Undisputed.	**The fact is established.**
32. According to Nicholas Gonzales, the time when CAO had everything it	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
needed from DenMat to build DenMat's lasers was in March or April of 2018. Kopp Decl., ¶ 7, Ex. C (Gonzales Depo. 207:3-21).		
33. After CAO received DenMat's six purchase orders on February 27, 2018, it contacted DenMat to notify DenMat that CAO was still missing information from DenMat which would prevent CAO from delivering finished products by the due dates in the purchase orders, and which was preventing CAO from manufacturing products in accordance with DenMat's specifications. CAO Decl. ¶ 11, Ex. 4 and 5 (Hult Email 3/12/18 and Jones Email 3/13/18)	Disputed; CAO was able to build SOLs and NVs using DenMat's components. Support: Casper Depo. at 168:21-169:7 (attached to Tiberi Decl. at Exh. 4); Cao Depo. at 92:12-21 (attached to Tiberi Decl. at Exh. 1).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
34. To determine whether CAO needed to make arrangements to purchase components from sources other than DenMat, and	Disputed; at least as early as February 2018, DenMat made CAO aware of its suppliers' contact information and provided a list of all DenMat laser component inventory to CAO; the parties were in	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary**

Uncontroverted Fact	DenMat's Response	CAO's Reply
otherwise plan its supply chain and manufacturing process, CAO needed DenMat to inform CAO whether DenMat intended to exercise its option under Section 4.2 of the Manufacturing Agreement. CAO Decl. ¶ 13.	constant contact regarding DenMat's inventory, which CAO could have purchased at any time. Support: CAO 002685-CAO 002693 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6).	**Judgment, nor supported by the evidence.** **In the event that DenMat decided to exercise its option to require CAO to purchase its existing inventory under Section 4.2 of the Manufacturing Agreement, CAO would be prohibited from purchasing components from any other source until DenMat's existing inventory was exhausted.** Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 3.1. **CAO was therefore unable to order any components from alternative sources, without risking a breach of Section 4.2 of the Manufacturing Agreement, until DenMat decided whether or not it was going to exercise the option under Section 4.2, and advised CAO accordingly.** *Id.*; Dkt. No. 41-2, CAO Decl. 6/24/19, ¶ 13. **DenMat fails to offer any evidence to controvert**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		the evidence presented in support of this uncontroverted fact, which speaks for itself.
35. CAO made direct requests to DenMat, attempting to get DenMat to state whether it intended to exercise its option under Section 4.2 of the Manufacturing Agreement. CAO Decl. ¶ 14; Kopp Decl., ¶ 9, Ex. E.	Disputed; at least as early as February 2018, DenMat made CAO aware of its suppliers' contact information and provided a list of all DenMat laser component inventory to CAO; the parties were in constant contact regarding DenMat's inventory, which CAO could have purchased at any time; CAO did not ask DenMat whether it intended to exercise the option in Section 4.2 of the Manufacturing Agreement. Support: CAO 002685-CAO 002693 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Depo. at Exh. 6); Casper Depo. at 130:21-131:22 (attached to Tiberi Decl. at Exh. 4).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **The DenMat e-mail cited in support of this uncontroverted fact shows that CAO asked DenMat whether it intended to exercise its option under Section 4.2 of the Manufacturing Agreement. In it, DenMat's Chief Operating Officer, Robert Cartagena, stated: "The CAO Group simply wants to know whether or not we will exercise our option and if so, what items and what quantities we will be selling."** Dkt. No. 41-20, Kopp Decl. 6/24/19, ¶ 9, Ex. E. **DenMat fails to offer any**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.
36. DenMat never exercised its option under Section 4.2 of the Manufacturing Agreement. CAO Decl. ¶ 15; Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 113:11-25 to 115:5-18).	Undisputed.	**The fact is established.**
37. DenMat never sent CAO any communication indicating whether or not it intended to exercise its option under Section 4.2 of the Manufacturing Agreement. CAO Decl. ¶ 16; Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 113:11-25 to 115:5-18).	Disputed; at least as early as February 2018, DenMat made CAO aware of its suppliers' contact information and provided a list of all DenMat laser component inventory to CAO; the parties were in constant contact regarding DenMat's inventory, which CAO could have purchased at any time; CAO did not ask DenMat whether it intended to exercise the option in Section 4.2 of the Manufacturing Agreement. Support: CAO 002685-CAO 002693 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **Robert Cartagena, DenMat's Chief Operating Officer, admits that this uncontroverted fact is true. He testified as follows:** Q. To your knowledge, did DenMat ever tell anyone at CAO that it was choosing not to exercise

Uncontroverted Fact	DenMat's Response	CAO's Reply
	6); Casper Depo. at 130:21-131:22 (attached to Tiberi Decl. at Exh. 4).	that option? **A. No. I don't believe that there was any communication either way of DenMat's choosing not to exercise the option or choosing to exercise the option. There was no communication either way.** Dkt. No. 41-17, Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 113:11-25 to 115:5-18). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
38. Because DenMat did not tell CAO one way or the other whether DenMat intended to exercise its option under Section 4.2 of the Manufacturing Agreement, CAO was unable to determine which, and how many, components CAO would be required to	Disputed; at least as early as February 2018, DenMat made CAO aware of its suppliers' contact information and provided a list of all DenMat laser component inventory to CAO; the parties were in constant contact regading DenMat's inventory, which CAO could have purchased at any time; CAO did not ask DenMat	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat has acknowledged in writing that CAO was**

Uncontroverted Fact	DenMat's Response	CAO's Reply
purchase from DenMat's existing inventory and which components CAO would be permitted to purchase from other sources. CAO Decl. ¶ 17.	whether it intended to exercise the option in Section 4.2 of the Manufacturing Agreement. Support: CAO 002685-CAO 002693 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6); Casper Depo. at 130:21-131:22 (attached to Tiberi Decl. at Exh. 4).	**requesting DenMat to advise whether it was going to exercise its option under Section 4.2 of the Manufacturing Agreement. DenMat's Chief Operating Officer, Robert Cartagena, stated: "The CAO Group simply wants to know whether or not we will exercise our option and if so, what items and what quantities we will be selling."** Dkt. No. 41-20, Kopp Decl. 6/24/19, ¶ 9, Ex. E. **Mr. Cartagena further admits that DenMat never told CAO whether it intended to exercise the option. He testified as follows:** Q. To your knowledge, did DenMat ever tell anyone at CAO that it was choosing not to exercise that option? **A. No. I don't believe that there was any communication either way of DenMat's choosing not to exercise the option or choosing to exercise the option. There was no**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		communication either way. Dkt. No. 41-17, Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 113:11-25 to 115:5-18). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
39. CAO manufactured and delivered products to DenMat during the pilot builds and process validation. CAO Decl. ¶ 18; Kopp Decl., ¶ 7, Ex. C (Gonzales Depo. 74:2-16, 109:10-14, 130:15-25 to 131:1-12); Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 107:16-25 to 108:1-12, 226:13-25 to 227:1); Kopp Decl., ¶ 5, Ex. A (Casper Depo. 163:22-25 to 164:1-10).	Disputed to the extend CAO intends "delivered" to have legal significance with respect to the Manufacturing Agreement or the License Agreement; CAO sent certain lasers to DenMat during the pilot builds and validation (but CAO was never able to successfully complete a validation for SOL or NVPro3 and never attempted to validate the laser tips). Support: Larsen Depo. at 108:7-109:14 (attached to Tiberi Decl. at Exh. 2); Gonzales Depo. at 74:24-75:25, 109:6-110:2 (attached to Tiberi Decl. at Exh. 7).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
40. CAO never made	Disputed to the extent that	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
products for DenMat using any vendors or components that DenMat had not approved. CAO Decl. ¶ 19.	DenMat cannot be certain that CAO never used a vendor or component that DenMat did not approve to make Products under the Manufacturing Agreement; if CAO did so, that would be a breach of the Manufacturing Agreement. Support: DEN 00001-00021 (Section 9.5) (attached to Tiberi Decl. at Exh. 10).	**DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
41. CAO's representation in Section 11.3 of the Manufacturing Agreement was true at the time CAO entered the Manufacturing Agreement, and it remains true. CAO Decl. ¶ 20.	Disputed; CAO's representation in Section 11.3 is false as demonstrated by its failure to perform and its statements that it cannot perform. Support: Cao Depo. at 141:6-23 (attached to Tiberi Decl. at Exh. 1); DEN 00275-00276, DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14; Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 3.	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
42. Over the course of this case, DenMat has not provided CAO with any	Disputed; the factual record is replete with evidence of DenMat's damages.	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the**

Uncontroverted Fact	DenMat's Response	CAO's Reply
evidence of damages DenMat has incurred as a result of CAO's alleged breaches of the Manufacturing Agreement. Kopp Decl. ¶ 4.	Support: Casper 238:20-239:10; 296:23-297:1 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 4.	**evidence.** **DenMat has presented no evidence supporting the damage claims it raised for the first time in response to CAO's Motion for Partial Summary Judgment. DenMat did not disclose these damage claims, or any evidence to support them, in its Initial Disclosures in this case or in any subsequent disclosure or production.** Kopp Decl., ¶ 3, Ex. Z (DenMat Initial Disclosures). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
43. While DenMat and CAO were working together under the Manufacturing Agreement, DenMat continued to make and sell the lasers that CAO was contracted to build. DenMat was not losing money at this time, and that	Disputed as misleading; DenMat lost the extra gross profit would have made if CAO performed by supplying lasers by March 1, 2018; DenMat lost $200,000 it paid to CAO in consideration for no-charge lasers and laser tips; DenMat lost money spent on its labor, time, and expenses; DenMat lost money on free components.	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the evidence.** **DenMat has presented no evidence supporting the damage claims it raised for the first time in response to CAO's Motion for Partial**

Uncontroverted Fact	DenMat's Response	CAO's Reply
DenMat was continuing to make money. Kopp Decl., ¶ 5, Ex. A	Support: Casper Depo. at 235:8-236:8, 238:20-239:10 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 4.	**Summary Judgment. DenMat did not disclose these damage claims, or any evidence to support them, in its Initial Disclosures in this case or in any subsequent disclosure or production.** Kopp Decl., ¶ 3, Ex. Z (DenMat Initial Disclosures). **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO, including the first payment of $200,000, in consideration for the license that CAO granted to DenMat under the License Agreement, not in consideration for "no-charge lasers and laser tips."** Dkt. No 55-7, Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1. **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
44. While DenMat	Disputed; CAO caused DenMat	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
and CAO were working together under the Manufacturing Agreement, DenMat was not losing money, but was continuing to make money. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 238:11-19).	to lose money prior to and each day after March 1, 2018 due to CAO's failure to supply lasers as of March 1, 2018 and CAO's breach of the Manufacturing Agreement; also, DenMat lost the extra gross profit would have made if CAO performed by supplying lasers by March 1, 2018; DenMat lost $200,000 it paid to CAO in consideration for nocharge lasers and laser tips; DenMat lost money spent on its labor, time, and expenses; DenMat lost money on free components; whether DenMat overall as a company with roughly 6,000 SKUs other than lasers was "making money" is immaterial. Support: Casper Depo. at 235:8-236:8 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 4.	**DenMat's attempt to create a disputed issue is evidence.** **DenMat has presented no evidence supporting the damage claims it raised for the first time in response to CAO's Motion for Partial Summary Judgment. DenMat did not disclose these damage claims, or any evidence to support them, in its Initial Disclosures in this case or in any subsequent disclosure or production.** Kopp Decl., ¶ 3, Ex. Z (DenMat Initial Disclosures). **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO, including the first payment of $200,000, in consideration for the license that CAO granted to DenMat under the License Agreement, not in consideration for "no-charge lasers and laser tips."** Dkt. No 55-7, Kopp Decl. 7/8/19, Ex. I (License Agreement)

Uncontroverted Fact	DenMat's Response	CAO's Reply
		§ 4.1. **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
45. DenMat's position is that it does not owe any future license payments or royalty fees to CAO, which potentially makes DenMat worth more to a prospective buyer of the company. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 298:6-25 to 299:1-3).	Disputed as misleading and immaterial; the deponent in the excerpt cited by CAO also testified that "[i]t would be pure speculation to indicate that we would somehow predetermine value of whatever royalties or license fees we would pay." Support: Casper Depo. at 298:6-15 (attached to Tiberi Decl. at Exh. 4).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
46. DenMat's anticipatory repudiation claims against CAO are based on alleged statements by CAO. Kopp Decl., ¶ 9, Ex. F (DenMat Resp. to First Set of Disc., Answer to Interrog. No. 3 11:20-28 to 12:1-16)	Disputed; the claims are based on CAO's statements and actions, including ceasing to perform under the Manufacturing Agreement, and multiple statements. Support: Cao Depo. at 126:6-127:6, 140:22-141:11 (attached to Tiberi Decl. at Exh. 1); Casper Depo. at 269:4- 25 (attached to Tiberi Decl. at	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat has never alleged in this case that its anticipatory**

Uncontroverted Fact	DenMat's Response	CAO's Reply
	Exh. 4); DEN05202-DEN05208, DEN 00704 (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14 (attached to Tiberi Decl. at Exh. 6); CAO 000250-000255 (attached to Tiberi Decl. at Exh. 9); Casper Decl., ¶ 3.	**repudiation claims are based on anything but statements made by CAO. Even if DenMat had attempted to claim that its repudiation claims are also based on alleged conduct by CAO, it has alleged no conduct by CAO whereby CAO ever "put[] it out of [its] power to perform so as to make substantial performance of [its] promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.)** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
47. On May 16, 2018, CAO sent DenMat a proposal to transition away from vendors and components DenMat had been using, and to alternative vendors and components identified by CAO, with DenMat's approval. CAO Decl., ¶ 21, Ex. 6 (CAO Proposal	Disputed as mischaracterizing the May 16, 2018 as a proposal "to transition away from vendors and components DenMat had been using"; in reality, the proposal was a demand to redesign DenMat's lasers by substituting at least 145 new components, requiring extraordinary DenMat resources, and taking several months if not years.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **David Casper, DenMat's Chief Executive Officer and appointed**

Uncontroverted Fact	DenMat's Response	CAO's Reply
May 16, 2018, DEN 4050-4056).	Support: DEN 00704 (attached to Tiberi Decl. at Exh. 10); CAO 000250-000255, 002922-002935 (attached to Tiberi Decl. at Exh. 9); Cao Depo. at 126:6-127:6 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 115:19-117:4, 121:7-122:2 (attached to Tiberi Decl. at Exh. 2); Casper Decl., ¶ 13.	**representative under Rule 30(b)(6), admits that the proposal that CAO sent DenMat on May 16, 2018 requests DenMat's approval to make the changes set forth in the proposal, which is consistent with the Manufacturing Agreement.** Dkt. No. 41-16, Kopp Decl. 6/24/19, ¶ 5, Ex. A (Casper Depo. 243:15-18). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
48. DenMat had requested that CAO prepare and send DenMat the May 16, 2018 proposal. CAO Decl., ¶ 22; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 224:15-17; 225:16-24).	Disputed as misleading; CAO verbally stated to DenMat it would not perform unless it can substitute components; DenMat asked CAO to memorialize the request so DenMat could consider it. Support: Casper Depo. at 223:18- 224:17 (attached to Tiberi Decl. at Exh. 4).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), admits that DenMat invited**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		CAO to prepare the proposal that CAO sent on May 16, 2018. Dkt. No. 41-16, Kopp Decl. 6/24/19, ¶ 5, Ex. A (Casper Depo. 224:15-17; 225:16-24). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
49. From the early stages of CAO's and DenMat's work together under the Manufacturing Agreement, the parties understood that CAO would be permitted to source components from vendors other than DenMat's existing vendors, and the parties discussed this openly. CAO Decl., ¶ 23; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 57:23-25 to 58:1-3, 59:13-19); Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. 55:4-11).	Disputed as incorrect; there was no understanding that CAO would be permitted to source components from vendors other than DenMat's existing vendors without DenMat's prior approval as expressly memorialized in the Manufacturing Agreement; CAO was not prohibited from sourcing components from other vendors, validating the components, and then proposing the validated components to DenMat; DenMat had sole discretion whether to approve or not approve any and all such suggestions from CAO, per the terms of the Manufacturing Agreement.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence. DenMat mischaracterizes the uncontroverted fact, which does not suggest that CAO intended to make changes without DenMat's approval.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
	Support: DEN 00001-00021 (Section 9.5) (attached to Tiberi Decl. at Exh. 10); Larsen Depo. at 48:13-49:2 (attached to Tiberi Decl. at Exh. 2); CAO 002034, CAO 002039 (attached to Tiberi Decl. at Exh. 9); Hult Depo. at 80:19-81:12 (attached to Tiberi Decl. at Exh. 3); Casper Decl., ¶ 15.	
50. The proposal that CAO sent DenMat on May 16, 2018 requests DenMat's approval to make the changes set forth in the proposal, which is consistent with the Manufacturing Agreement. CAO Decl., ¶ 24; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 243:15-18).	Disputed as incorrect and mischaracterizes the May 16, 2018 communication as a proposal "to transition away from vendors and components DenMat had been using"; in reality, the proposal was a demand to redesign DenMat's lasers by substituting at least 145 new components, requiring extraordinary DenMat resources, and taking several months if not years. Support: DEN 00704 (attached to Tiberi Decl. at Exh. 10); CAO 000250-000255, CAO 002034, CAO 002039, CAO 002922-002935 (attached to Tiberi Decl. at Exh. 9); Cao Depo. at 126:6-127:6 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 48:13-49:2, 115:19-117:4,	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), admits that the proposal that CAO sent DenMat on May 16, 2018 requests DenMat's approval to make the changes set forth in the proposal, which is consistent with the Manufacturing**

Uncontroverted Fact	DenMat's Response	CAO's Reply
	121:7-122:2 (attached to Tiberi Decl. at Exh. 2); Casper Depo. at 244:2-246:3 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶¶ 12, 13.	**Agreement.** Dkt. No. 41-16, Kopp Decl. 6/24/19, ¶ 5, Ex. A (Casper Depo. 243:15-18). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
51. After CAO sent DenMat the May 16, 2018 proposal, DenMat did not consider approving any of the changes CAO proposed, but rejected it out of hand. CAO Decl., ¶ 25; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 246:16-25 to 247:1-5).	Disputed; DenMat considered approving the proposal but, eight days after in received the proposal, ultimately rejected it because of, *inter alia*, the extraordinary burden it would place on DenMat resources (and the fact that CAO had no legal right to force DenMat to accept the proposal). Support: DEN 00700-00703 (attached to Tiberi Decl. at Exh. 10); Casper Depo. at 244:2-246:3 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶¶ 12, 13.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), admits that DenMat never considered any of the proposed changes that presented in the proposal that CAO sent DenMat on May 16, 2018, and further admits that "the proposal, in itself, was rejected out of hand."** Dkt. No. 41-16, Kopp Decl. 6/24/19, ¶ 5,

Uncontroverted Fact	DenMat's Response	CAO's Reply
		Ex. A (Casper Depo. 246:16-25 to 247:1-5). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
52. After DenMat rejected CAO's May 16, 2018 proposal and refused to consider approving alternative vendors or components, Densen Cao contacted David Casper to ascertain why. CAO Decl., ¶ 26.	Disputed; DenMat considered approving the proposal but, eight days after the proposal, ultimately rejected it because of, *inter alia*, the extraordinary burden it would place on DenMat resources (and the fact that CAO had no legal right to force DenMat to accept the proposal); Densen Cao contacted David Casper not to ascertain why but to demand that DenMat accept his proposal. Support: DEN 00700-00703, DEN 05202-05208 (DEN 05203) (attached to Tiberi Decl. at Exh. 10); Casper Depo. at 244:2-246:3 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶¶ 12, 13.	**DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), admits that DenMat never considered any of the proposed changes that presented in the proposal that CAO sent DenMat on May 16, 2018, and further admits that "the proposal, in itself, was rejected out of hand."** Dkt. No. 41-16, Kopp Decl. 6/24/19, ¶ 5, Ex. A (Casper Depo. 246:16-25 to 247:1-5).

Uncontroverted Fact	DenMat's Response	CAO's Reply
		DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.
53. Densen Cao represented to David Casper that CAO would suffer a loss on each laser it made under the Manufacturing Agreement if DenMat refused to approve vendors and components other than those DenMat had been using, thus undermining the purpose of the Manufacturing Agreement, which was supposed to allow CAO to profit on each laser sold. DenMat's known costs to make each laser, using its existing vendors and components and without including any profit margin, were higher than the final sale prices CAO could charge for each laser under Section 5.2 of the	Disputed; Dr. Cao told David Casper that if CAO performed under the Manufacturing Agreement using DenMat's component and vendors, CAO would make 12% profit margin on the SOL laser and 5% profit on the NVPro3 laser but wanted to make more money; CAO also admitted it would make even more profit on the laser tips. Support: Casper Depo. at 256:11-21, 289:23-290:19 (attached to Tiberi Decl. at Exh. 4); Cao Depo. at 91:14-21, 126:6-127:6, 160:5-11 (attached to Tiberi Decl. at Exh. 1); DEN 05202-05208 (DEN 05204) (attached to Tiberi Decl. at Exh. 10); Casper Decl., ¶ 11.	**DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **The testimony cited from David Casper does not support DenMat's statement. Mr. Casper's testimony was that Dr. Cao represented to him that CAO had a "gross margin of 12 percent for SOL, 5 percent for the NV PRO3," and that Mr. Casper interpreted these representations as "profit that CAO Group would realize if it followed the manufacturing agreement as written and agreed to."** Dkt. No. 38-4, Casper Depo. at 289:23-290:19 (attached to Tiberi Decl. at Ex. 4). **DenMat's cited**

Uncontroverted Fact	DenMat's Response	CAO's Reply
Manufacturing Agreement. CAO Decl., ¶¶ 27-28.		**testimony from Mr. Casper expressly notes that this was Mr. Casper's interpretation of something Dr. Cao allegedly said, based on Mr. Casper's understanding of the Manufacturing Agreement "as written and agreed to." However, Mr. Casper admitted that, as written and agreed to, the Manufacturing Agreement does not state that CAO must only use DenMat's existing vendors and components.** Dkt. No. 55-10, Kopp Decl., ¶ 8, Ex. M (Casper Depo. 257:7-24). **Section 9.5 of the Manufacturing Agreement, as written and agreed to, permits CAO to use alternative vendors and components, with DenMat's approval.** Dkt. No. 55-6, Kopp Decl. 7/8/19, ¶ 3, Ex. H, § 9.5 (Manufacturing Agreement). **The testimony DenMat cites from Dr. Cao also**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		does not support this statement. In the cited testimony, Dr. Cao states that CAO "should make a profit with all the product we build." Dkt. No. 38-1, Cao Depo. at 91:14-21 (attached to Tiberi Decl. at Exh. 1). **This is a general statement about why CAO enters agreements to build products, not a statement about CAO's ability to profit from the Manufacturing Agreement if DenMat refuses to approve any alternative vendors and components, as DenMat is attempting to imply. The other testimony DenMat cites from Dr. Cao on this point also does not help DenMat, as he confirmed that when he represented the gross margins to Mr. Casper, they were based on DenMat agreeing to approve CAO's desire to source non-critical components from alternative vendors.** *Id.* at 160:5-11 (attached to Tiberi Decl. at Exh. 1). **DenMat fails to offer any evidence to controvert**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		the evidence presented in support of this uncontroverted fact, which speaks for itself.
54. Densen Cao represented to David Casper that if DenMat had not intended to approve vendors and components other than those DenMat had been using, then that would have made the Manufacturing Agreement "D.O.A." CAO Decl., ¶ 29.	Disputed as mischaracterizes the evidence; Dr. Cao told David Casper that the Manufacturing Agreement was "D.O.A." because CAO refused to perform in accordance with its terms and wanted to make more money out of the deal. Support: Cao Depo. at 171:21-172:16 (attached to Tiberi Decl. at Exh. 1); Casper Depo. at 285:5-25 (attached to Tiberi Decl. at Exh. 4); DEN 05202-05208 (attached to Tiberi Decl. at Exh. 10).	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the evidence.** **Neither the testimony cited from Dr. Cao nor Mr. Casper supports DenMat's contention that Dr. Cao ever represented that the Manufacturing Agreement was "D.O.A." because CAO "wanted to make more money out of the deal," or anything to that effect.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
55. Densen Cao represented to David Casper that the Manufacturing Agreement does not require CAO to use only DenMat's	Disputed as mischaracterizes CAO's requests to use alternative vendors and components, with DenMat's approval; in reality, the proposal was a	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary**

Uncontroverted Fact	DenMat's Response	CAO's Reply
existing vendors and components, but permits CAO to use alternative vendors and components, with DenMat's approval. CAO Decl., ¶ 30.	demand to redesign DenMat's lasers by substituting at least 145 new components, requiring extraordinary DenMat resources, and taking several months if not years to complete the project. Support: CAO 000250-000255, CAO 002922-002935 (attached to Tiberi Decl. at Exh. 9); Cao Depo. at 126:6-127:6 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 115:19-117:4, 121:7-122:2 (attached to Tiberi Decl. at Exh. 2); Casper Depo. at 244:2-246:3 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 12.	**Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
56. By representing to David Casper that DenMat's attempt to force CAO to use only DenMat's existing vendors and components would have made the Manufacturing Agreement "D.O.A.," Densen Cao meant that the contract	Disputed as mischaracterizes the evidence; Dr. Cao told David Casper that the Manufacturing Agreement was "D.O.A." because CAO refused to perform in accordance with its terms and wanted to make more money out of the deal; CAO would have made a profit if it performed under the Manufacturing Agreement; Dr.	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the evidence.** **None of the testimony cited supports DenMat's contention that Dr. Cao ever represented that the Manufacturing Agreement was**

Uncontroverted Fact	DenMat's Response	CAO's Reply
would have been a losing venture for CAO from the beginning, because DenMat's known cost to make each laser using its existing vendors and components was higher than the final sale price that CAO was permitted to charge DenMat per laser under Section 5.2 of the Manufacturing Agreement. CAO Decl., ¶ 31.	Cao told David Casper that if CAO performed under the Manufacturing Agreement using DenMat's components and vendors, that CAO would make 12% profit margin on the NVPro3 laser and 5% profit on the SOL laser but wanted to make more money; CAO also admitted it would make even more profit on the laser tips. Support: Cao Depo. at 91:14-21, 126:6-127:6, 160:5-11, 171:21-172:16 (attached to Tiberi Decl. at Exh. 1); Casper Depo. at 256:11-21, 285:5-25, 289:23-290:19, (attached to Tiberi Decl. at Exh. 4); CAO 000250-000255 (attached to Tiberi Decl. at Exh. 9); DEN 05202-05208 (DEN 05204) (attached to Tiberi Decl. at Exh. 10); Casper Decl., ¶ 11.	**"D.O.A." because CAO "wanted to make more money out of the deal," or anything to that effect.** **The testimony cited from David Casper does not support DenMat's statement. Mr. Casper's testimony was that Dr. Cao represented to him that CAO had a "gross margin of 12 percent for SOL, 5 percent for the NV PRO3," and that Mr. Casper interpreted these representations as "profit that CAO Group would realize if it followed the manufacturing agreement as written and agreed to."** Dkt. No. 38-4, Casper Depo. at 289:23-290:19 (attached to Tiberi Decl. at Ex. 4). **DenMat's cited testimony from Mr. Casper expressly notes that this was Mr. Casper's interpretation of something Dr. Cao allegedly said, based on Mr. Casper's understanding of the Manufacturing Agreement "as written and agreed to."**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		However, Mr. Casper admitted that, as written and agreed to, the Manufacturing Agreement does not state that CAO must only use DenMat's existing vendors and components. Dkt. No. 55-10, Kopp Decl., ¶ 8, Ex. M (Casper Depo. 257:7-24). **Section 9.5 of the Manufacturing Agreement, as written and agreed to, permits CAO to use alternative vendors and components, with DenMat's approval.** Dkt. No. ___, Kopp Decl. 7/8/19, ¶ 4, Ex. H, § 9.5 (Manufacturing Agreement). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
57. DenMat admits that it does not understand what Densen Cao was thinking, or what he meant, when Mr. Cao	Disputed as mischaracterizes the evidence; DenMat understood it meant CAO was not going to source the components from approved	**The fact is established. DenMat's attempt to create a disputed issue is not supported by the evidence.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
allegedly said "the Agreement was D.O.A." Kopp Decl., ¶ 5, Ex. A (Casper Depo. 263:1-25 to 264:1).	vendors as required by the Manufacturing Agreement. Support: Casper Depo. at 285:5-25 (attached to Tiberi Decl. at Exh. 4).	**Mr. Casper, DenMat's appointed representative under Rule 30(b)(6), admits that he does not understand what Dr. Cao was thinking, or what he meant, when he said "D.O.A." and that he "has no idea what that means" to Dr. Cao.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 263:1-25 to 264:1). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
58. Beginning on May 24, 2018, Densen Cao and David Casper exchanged e-mails, the first of which contained the following statement by Mr. Cao, among others: "The best way to move forward is that DenMat will pay ongoing royalty for lasers and tip sales per license agreement, it will be 10% of net sales	Disputed as misleading for incompleteness; the cited email also contains Dr. Cao's admission that CAO refuses to source components from DenMat's vendors, which is a breach of the Manufacturing Agreement and CAO's motive for its breach, namely, that it claims it would lose money if it performed under the Manufacturing Agreement; also misleading as fails to provide proper context, which was CAO had stopped performing and was threatening	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
starting Jan. 1, 2018." CAO Decl., ¶ 32, Ex. 7 (Cao and Casper E-mails, DEN 700-01)	DenMat. Support: DEN 00701-00702, DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10).	
59. CAO's May 16, 2018 proposal was prepared upon DenMat's invitation, does not include the word "demand" or anything to that effect, and is framed as a proposal for DenMat to accept or reject. Kopp Decl., ¶ 5, Ex. A (Casper Depo. 225:16-25 to 226:1-17).	Disputed as misleading; CAO verbally stated to DenMat it would not perform unless it can substitute components; DenMat asked CAO to memorialize the request so DenMat could consider it; further disputed as mischaracterizing the May 16, 2018 communication as a proposal; in reality, the proposal was a demand to redesign DenMat's lasers by substituting at least 145 new components, requiring extraordinary DenMat resources, and taking several months if not years. Support: DEN 00704 (attached to Tiberi Decl. at Exh. 10); Cao Depo. at 126:6-127:6 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 115:19-117:4, 121:7-122:2 (attached to Tiberi Decl. at Exh. 2); CAO 000250-000255, 002922-002935 (attached to Tiberi Decl. at Exh. 9); DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10); Casper Depo. at 223:18-224:17; 244:2-246:3; Casper Decl., ¶¶ 12, 13.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **Mr. Casper, DenMat's appointed representative under Rule 30(b)(6), admits that CAO's May 16, 2018 proposal was prepared upon DenMat's invitation, does not include the word "demand" or anything to that effect, and is framed as a proposal for DenMat to accept or reject.** Dkt. No. 41-16, Kopp Decl., ¶ 5, Ex. A (Casper Depo. 225:16-25 to 226:1-17). **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
60. In its attempts to continue working with DenMat under the Manufacturing Agreement, CAO never demanded to increase the prices set forth in the Manufacturing Agreement, or demanded that DenMat accept one of the three options set forth in the May 16, 2018 proposal. CAO Decl., ¶ 33.	Disputed as mischaracterizing; CAO verbally stated to DenMat it would not perform unless it can substitute components; further disputed as mischaracterizing the May 16, 2018 communication as a proposal; in reality, the proposal was a demand to redesign DenMat's lasers by substituting at least 145 new components, requiring extraordinary DenMat resources, and taking several months if not years. Support: Cao Depo. at 126:6-127:6 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 115:19-117:4, 121:7-122:2 (attached to Tiberi Decl. at Exh. 2); CAO 000250-000255, CAO 002922-002935 (attached to Tiberi Decl. at Exh. 9); Casper Depo. at 223:18-224:17; 244:2-246:3 (attached to Tiberi Decl. at Exh. 4); DEN 00704, DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10); Casper Decl., ¶¶ 12, 13.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
61. On or about May 29, 2018, CAO received a letter from DenMat's counsel, Todd Tiberi, accusing	Undisputed.	**The fact is established.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
CAO of repudiating the Manufacturing Agreement, stating that DenMat desired that CAO honor the terms of the Manufacturing Agreement, and requesting that CAO revoke alleged repudiating statements. CAO Decl., ¶ 34, Ex. 8 (Tiberi Letter, CAO 2838-2839)		
62. On June 1, 2018, CAO responded to Todd Tiberi's May 29, 2018 letter, denying that CAO had repudiated the Manufacturing Agreement and revoking any alleged statements of repudiation made on behalf of CAO. CAO Decl., ¶ 25, Ex. 9 (Jones Letter, CAO 002844-2845).	Disputed as mischaracterizing the evidence; CAO's June 1, 2018 did not serve as a revocation of those repudiating statements and acts committed by CAO before or after June 1, 2018. Support: DEN 00275-00276, 05202-05208 (attached to Tiberi Decl. at Exh.10); Cartagena Depo. at 254:21-255:14 (attached to Tiberi Decl. at Exh. 6); Casper Decl., ¶ 3.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
63. The Manufacturing Agreement contains no deadlines or time for CAO to deliver products to DenMat.	Disputed; the Manufacturing Agreement states that "[CAO] will use commercially reasonable efforts under this Agreement to develop and deliver the Products within three	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for**

Uncontroverted Fact	DenMat's Response	CAO's Reply
CAO Decl., ¶ 3, Ex. 2 (Manufacturing Agreement, Deposition Exhibit 6).	(3) months of signing this Agreement." In addition, the License Agreement states that the Parties intend CAO to make a first delivery of lasers "no later than March 1, 2018" and that CAO's failure to make the first delivery under the Manufacturing Agreement by March 15, 2018 shall mean DenMat will owe no additional payments to CAO. Support: DEN 00022-00035 (Section 4.1) (attached to Tiberi Decl. at Exh. 10).	**Partial Summary Judgment, nor supported by the evidence.** **DenMat omits the language in the Manufacturing Agreement which immediately follows its quote: "The Timeline is an estimate and may take more or less time depending on many factors."** Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 4.1. **DenMat also mischaracterizes the parties' rights and obligations under the License Agreement. DenMat has brought no claim in this case pursuant to the terms of the License Agreement. DenMat's arguments regarding the License Agreement are immaterial to the issues before the Court on DenMat's affirmative claims under the Manufacturing Agreement and for unjust enrichment, which claims are the**

Uncontroverted Fact	DenMat's Response	CAO's Reply
		subject of CAO's Motion for Partial Summary Judgment. **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
64. David Casper sent an e-mail to Densen Cao on May 25, 2018 which stated that he appreciated the line of thinking that went into CAO's proposal, and in reference to the alleged "D.O.A" comment, stated that DenMat wanted to move forward under the Manufacturing Agreement. CAO Decl., ¶ 32, Ex. 4 (Cao and Casper E-mails, DEN 00700-01)	Disputed as misleading by omitting David Casper's additional statements in the referenced email that DenMat "would like to move forward with the original contract and expect CAO Group to honor its terms by making our lasers for the agreed upon price(s) utilizing existing components listed on the bill of materials." Support: DEN 00700-00702 (attached to Tiberi Decl. at Exh. 10).	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
65. DenMat did not stop working with CAO under the Manufacturing Agreement until early June 2018. CAO Decl., ¶ 36; Kopp Decl., ¶ 6, Ex. B (Cartagena Depo. at 253:9-15, 254:15-	Disputed as vague as to "stop working with" and disputed as mischaracterizes the evidence; the deponent cited also testified that "CAO Group had sent [DenMat] an e-mail on May 2nd [2018] saying we are not working on this anymore." Support: Cartagena Depo. at 254:21-255:14 (attached to	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.**

Uncontroverted Fact	DenMat's Response	CAO's Reply
20).	Tiberi Decl. at Exh. 6); DEN 00275-00276, DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10); Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 3.	**DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
66. On May 22, 2018, CAO sent DenMat an invoice for tooling needed for tips, but DenMat refused to pay it. CAO Decl., ¶ 37, Ex. 10 (Hult and Cartagena E-mails, CAO 000141-44).	Disputed as misleading; CAO had already repudiated the Manufacturing Agreement before the invoice was sent and never nullified its repudiation; CAO's sending the invoice was a transparent ploy to try to drum up an issue; CAO never paid for the tooling and never sent DenMat tooling design for DenMat to evaluate whether the proposed tooling could even be used. Support: Cartagena Depo. at 254:21-255:14 (attached to Tiberi Decl. at Exh. 6); DEN 05202-05208 (attached to Tiberi Decl. at Exh. 10); Casper Decl., ¶ 5.	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
67. On or about July 3, 2018, CAO received a communication from Todd Tiberi on behalf of DenMat, inviting CAO to make a proposal "in accordance with the manufacturing agreement." CAO Decl., ¶ 38, Ex.	Disputed as incorrect if intended to imply CAO had revoked its repudiation and misleading for omitting the entire sentence from which the excerpt is taken: "Said proposal must fundamentally be in-line with the original terms of the manufacturing agreement and must maintain the integrity and quality of the products by using the existing specifications,	**The fact is established. DenMat's attempt to create a disputed issue is neither material to the issues before the Court on CAO's Motion for Partial Summary Judgment, nor supported by the evidence.** **DenMat fails to offer any**

Uncontroverted Fact	DenMat's Response	CAO's Reply
11 (Tiberi July 3, 2018 E-mail, CAO 002834).	components, and approved vendors in accordance with the manufacturing agreement." Support: CAO 002834 (attached to Tiberi Decl. at Exh. 9); DEN00275-00276, DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10); Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4); Cartagena Depo. at 254:4-255:14 (attached to Tiberi Decl. at Exh. 6); Casper Decl., ¶ 3.	**evidence to controvert the evidence presented in support of this uncontroverted fact, which speaks for itself.**
68. The parties never amended or modified the Manufacturing Agreement. CAO Decl., ¶ 39; Kopp Decl., ¶ 5, Ex. A (Casper Depo. 150:7-10).	Undisputed.	**The fact is established.**
69. On or about June 4, 2018, CAO received a letter from DenMat's counsel, Todd Tiberi, bearing the subject line "Written Notice of Breach," and accusing CAO of breaching provisions of the Manufacturing Agreement. CAO Decl., ¶ 40, Ex. 12 (Tiberi June 4, 2018 Letter (CAO 2852-53).	Undisputed.	**The fact is established.**

RESPONSE TO DENMAT UNCONTROVERTED FACT SUPPORTING EVIDENCE

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
1. Under the Manufacturing Agreement, CAO was obligated to make DenMat's lasers (sold under the tradenames SOL® and NV®Pro3) as DenMat had been making them (Product Changes, Section 9.5) and sell them to DenMat at the agreed prices (Pricing, Section 5.2).Compl., ¶¶ 15-16 (Dkt. 1); DEN00001-00021 (Sections 4.3, 5.1,5.2) (attached to Tiberi Decl. at Exh. 10).	**Disputed, but immaterial to the issues before the Court on CAO's Motion for Partial Summary Judgment. DenMat's statement is also contradicted by the evidence.** **DenMat's statement misstates what is set forth in "Product Changes" provision of the Manufacturing Agreement, Section 9.5. Section 9.5 of the Manufacturing Agreement allows CAO to make changes to the components, vendors, and specifications used to manufacture DenMat's products, with DenMat's approval.** Dkt. No. 55-6, Kopp Decl. 7/8/19, ¶ 3, Ex. H, § 9.5 (Manufacturing Agreement). **DenMat admits that the Manufacturing Agreement does not contain language requiring that DenMat's products must be made with only DenMat's 'existing' components from DenMat's 'existing' suppliers, as DenMat's statement attempts to suggest.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 257:7-24). **DenMat also admits that the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	proposal that CAO submitted to DenMat requests approval from DenMat to make changes, which is consistent with the terms of the Manufacturing Agreement, which further contradicts DenMat's statement. Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18).
2. The Product Changes term of the Manufacturing Agreement required CAO to use DenMat's components and vendors and allowed for CAO to propose changes, which DenMat could approve (or not). DEN 00001-00021 (Section 9.5) (attached to Tiberi Decl. at Exh.10); Compl., ¶ 15 (Dkt. 1).	**Undisputed.**
3. Five days after signing the Manufacturing Agreement, DenMat paid CAO $200,000. Compl., ¶¶ 15-16 (Dkt. 1); DEN00001-00021 (Sections 4.3, 5.1, 5.2) (attached to Tiberi Decl.at Exh. 10); Cao Depo. at 50:10-21 (attached to Tiberi Decl. at Exh. 1).	**Undisputed, though DenMat's statement seems to imply that DenMat's payment of $200,000 to CAO had something to do with the Manufacturing Agreement. It did not. DenMat's owed this payment, and made it, pursuant to the terms of the License Agreement, not the Manufacturing Agreement. Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO, including the first payment of $200,000, in consideration for the license that CAO granted to DenMat under the License Agreement,**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	not for anything under the Manufacturing Agreement. Dkt. No. 55-7 Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1.
4. This was the first of payments that were to total $800,000, in consideration for CAO's delivering to DenMat lasers worth $724,000 under an Initial Purchase Order. DEN 00001-00021 (Section 7.1), DEN 00022-00035 (Section 4.1) (attached to Tiberi Decl. at Exh. 10); DEN05200-DEN05201 (attached to Tiberi Decl. at Exh. 10); Cao Depo. at 48:23-49:24, 156:16-23 (attached to Tiberi Decl. at Exh. 1); Casper Decl. ¶ 2.	**Disputed, but immaterial to the issues before the Court on CAO's Motion for Partial Summary Judgment. DenMat's statement is also contradicted by the evidence.** **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO, including the first payment of $200,000, in consideration for the license that CAO granted to DenMat under the License Agreement, not for lasers.** Dkt. No. 55-7, Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1.
5. The Product Changes term is found at Section 9.5 of the Manufacturing Agreement. DEN 00001-00021 (Section 9.5) (attached to Tiberi Decl. at Exh. 10); Compl., ¶ 15 (Dkt. 1).	**Undisputed.**
6. The express language of Section 9.5 gives DenMat the right to change components and offers CAO no such right. DEN 00001-00021 (Section 9.5) (attached to Tiberi Decl. at Exh. 10); Compl., 15 (Dkt. 1).	**Disputed, but this statement does not raise a genuine issue of material fact. DenMat's statement is contradicted by the evidence.** **Section 9.5 of the Manufacturing Agreement allows CAO to make changes to**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	the components, vendors, and specifications used to manufacture DenMat's products, with DenMat's approval. Dkt. No. 55-7, Kopp Decl. 7/8/19, ¶ 3, Ex. H, § 9.5 (Manufacturing Agreement). **Section 9.5 of the Manufacturing Agreement also contains no language that relieving DenMat of its duty to adhere to the implied covenant of good faith and fair dealing, i.e. to refrain from doing anything which would injure the right of CAO to receive the benefits of the Manufacturing Agreement.** *Id.* **DenMat also admits that the proposal that CAO submitted to DenMat requests approval from DenMat to make changes, which is consistent with the terms of the Manufacturing Agreement, which further contradicts DenMat's statement.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18).
7. CAO neither sought, bargained for, or offered consideration for a right to change components without need for DenMat to approve. Casper Decl., ¶ 14.	**Undisputed.**
8. CAO's Vice President of Products and Vice President of Operations each confirmed there was no such "shared understanding"	**Undisputed that CAO always understood that proposed changes to components would**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
that CAO could change components because CAO understood it had no right to change components without first receiving DenMat's approval. CAO 002034, CAO 002039 (attached to Tiberi Decl. at Exh. 9); Larsen Depo. at 48:13-49:2 (attached to Tiberi Decl. at Exh. 2).	**not be implemented before they received DenMat's approval. DenMat's statement mischaracterizes the evidence cited, so this part of DenMat's statement is disputed. However, this statement does not raise a genuine issue of material fact, and it is also contradicted by the evidence.** **DenMat has admitted that it was understood from the beginning that CAO would be able to source components from alternative vendors, and DenMat was not demanding or requiring that CAO use only DenMat's existing vendors and components.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 57:23-58:3, 59:13-19); Dkt. No. 55-9, Kopp Decl., ¶ 7, Ex. L (Cartagena Depo. 55:4-11).
9. The plain meaning of the Pricing term (Section 5.2) in the Manufacturing Agreement is that CAO shall charge DenMat $1,199 for a SOL laser, $1,029 for an NVPro3 laser, and $1.95 for a Laser tip. DEN 00001-00021 (Section 5.2) (attached to Tiberi Decl. at Exh. 10); Compl., ¶ 16 (Dkt. 1).	**Undisputed.**
10. There is no provision in the Manufacturing Agreement giving either party the right to increase or decrease the Pricing term. DEN 00001-00021 (Section 5.2) (attached to Tiberi Decl. at Exh. 10);	**Disputed, but immaterial to the issues before the Court on CAO's Motion for Partial Summary Judgment. DenMat's statement is also contradicted**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
Compl., ¶ 16 (Dkt. 1).	**by the evidence.** **The parties had the right to modify any provision of the Manufacturing Agreement if they so chose, under Section 13.7.** Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H, § 13.7 (Manufacturing Agreement).
11. In February 2018, three months after the Manufacturing Agreement was signed, CAO requested for the first time, and DenMat provided to CAO, the prices it paid for its laser components. CAO 002655 (attached to Tiberi Decl. at Exh. 9).	**Disputed, but this statement does not raise a genuine issue of fact that is material to the issues before the Court on CAO's Motion for Partial Summary Judgment. DenMat's statement is also contradicted by the evidence, and not supported by the evidence it cites.** **DenMat's statement mischaracterizes the document cited. The document is not a request from CAO for DenMat's laser component prices, nor a response from DenMat to such a request. The cited document is a single e-mail selected from a larger exchange between the parties, and it is taken out of context. The e-mail exchange regards an option that DenMat held under Section 4.2 of the Manufacturing Agreement to require CAO to purchase DenMat's existing inventory at the lesser of: DenMat's material cost plus 4%, or the fair market**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
	price. Dkt. No. 55-14, Kopp Decl. 7/8/19, ¶12, Ex. Q (DEN 133-138; Dkt. No. 55-6, Kopp Decl. 7/8/19 ¶ 4, Ex. H, § 4.2 (Manufacturing Agreement). **CAO had repeatedly requested prior to February 2018, and continuing thereafter, that DenMat tell CAO whether DenMat intended to exercise its option under Section 4.2, and if so, to please provide CAO with the cost information for the items DenMat wished to sell to CAO from its existing inventory, so that the parties could determine whether CAO would pay: DenMat's material cost plus 4%, or the fair market price, whichever is less. When CAO presented DenMat with information showing that the fair market price for the components was lower than DenMat's material costs, DenMat attempted to persuade CAO to pay a negotiated "middle ground" price, but DenMat ultimately never exercised the option.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 9; Dkt. No. 55-9, Kopp Decl. 7/8/19, ¶ 7, Ex. L (Cartagena Depo. 113:11-25 to 115:5-18); Dkt. No. 55-15, Kopp Decl. 7/8/19, ¶ 14, Ex. R (DEN 2870).
12. DenMat required the pre-approval right	**Undisputed, immaterial to the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
because, *inter alia*, DenMat's SOL and NVPro3 are Class IIb medical devices highly-regulated by the U.S. Food & Drug Administration ("FDA"). Casper Decl., ¶ 17.	**issues before the Court on CAO's Motion for Partial Summary Judgment.**
13. CAO acknowledged that the price differences between DenMat's costs and CAO's so-called "Market Price" were "quite minor concerns" CAO 002655 (attached to Tiberi Decl. at Exh. 9).	**Disputed, but immaterial to the issues before the Court on CAO's Motion for Partial Summary Judgment. DenMat's statement is also contradicted by the evidence, and is not supported by the evidence it cites.** **The document sets forth a list of concerns, but does not state that the difference between DenMat's costs for its existing inventory components and the fair market price is one of the "minor concerns" referenced.** **CAO was, in fact, very concerned that DenMat was refusing to acknowledge CAO's right to pay the lower fair market prices for the components in DenMat's existing inventory, if DenMat decided to exercise its option under Section 4.2 of the Manufacturing Agreement and required CAO to buy components from DenMat.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 10; *See also* Dkt. No. 55-6, Kopp Decl. 7/8/19, ¶ 3, Ex. H, § 4.2 (Manufacturing Agreement). **The document cited actually**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	undermines DenMat's statement. It supports the fact that the difference between the fair market price and DenMat's cost was an important concern for CAO, as it states that the first option to resolve these concerns is to "[d]ecrease purchase cost of transferred inventory to match current market price," which was CAO's right under Section 4.2 to pay the lower price, if DenMat decided to exercise its option.
14. CAO acknowledged that "the total dollar amount is not huge." CAO 000019-00020 (attached to Tiberi Decl. at Exh. 9).	**Undisputed, immaterial to the issues before the Court on CAO's Motion for Partial Summary Judgment.**
15. CAO eventually demanded that it be allowed to increase the prices because it was unhappy with the amount of profits it projected it would make under the Manufacturing Agreement. CAO 000250-000255 (attached to Tiberi Decl. at Exh. 9); Cao Depo. at 126:6-127:6 (attached to Tiberi Decl. at Exh. 1); CAO 002861- 002862 (attached to Tiberi Decl. at Exh. 9); DEN 05202-05208 (attached to Tiberi Decl. at Exh. 10).	**Disputed, but this statement does not raise a genuine issue of material fact, and it is not supported by any evidence, including the evidence that DenMat cites.** **Nowhere in any of the cited evidence is any reference to any such 'demand'. The testimony cited from Dr. Cao deals with CAO's May 16, 2018 Proposal, which is also cited, handwritten notes from Mr. Casper, along with an April 26, 2018 e-mail from DenMat Chief Operating Officer, Robert Cartagena, wherein he discussed the options for a "go forward plan"**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	based on the acknowledged fact that CAO would suffer a loss if it were forced to use only DenMat's existing vendors and components. **CAO never demanded that DenMat agree to a price increase or that DenMat do anything contrary to any term of the Manufacturing Agreement, including Section 9.5.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 30. **DenMat admits that CAO's Proposal to make changes is consistent with the terms of the Manufacturing Agreement, as it is written.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18). **DenMat further admits that CAO's proposal was not a "demand" or anything to that effect.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 225:16-25 to 226:1-17).
16. CAO has a 15-year history of making dental lasers. Cao Depo. at 98:24-99:7 (attached to Tiberi Decl. at Exh. 1).	**Undisputed.**
17. CAO assured DenMat it has lower costs than DenMat. Hult Depo. at 43:11-44:21 (attached to Tiberi Decl. at Exh. 3); Cao Depo. at 69:13-15, 99:3-7 (attached to Tiberi Decl. at Exh. 1).	**Undisputed that CAO's costs to make the lasers, using alternative vendors and components, were lower than the costs to make the lasers using DenMat's existing vendors and components.**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
18. CAO was familiar with DenMat's lasers. Cao. Depo. at 37:1-25 (attached to Tiberi Decl. at Exh. 1).	**Undisputed.**
19. CAO blamed DenMat for its failure to negotiate pricing more to CAO's liking. CAO's Response to DenMat's First Set of Requests for Admission, Nos. 6 and 12 (attached to Tiberi Decl. at Exh. 11).	**Disputed, but this statement does not raise a genuine dispute of fact and it is not supported by any evidence. DenMat cites two of CAO's responses to DenMat's requests for admission, neither of which supports this statement in any way.**
20. CAO represented in sworn discovery responses that prior to signing the Manufacturing Agreement, it had asked but DenMat refused to tell CAO its laser costs. CAO's Response to DenMat's First Set of Requests for Admission, Nos. 6, 10, 12, and 16 (attached to Tiberi Decl. at Exh. 11).	**Undisputed.**
21. CAO later admitted that these sworn representations were false. Larsen Depo. at 23:5-17, 76:25- 77:10 (attached to Tiberi Decl. at Exh. 2).	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites.** **There is nothing contained in the testimony which indicates that any of CAO's discovery responses are untrue.** **Rob Larsen was asked if he remembers requests for DenMat's material costs. He**

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	testified that he, Rob Larsen, did not remember those requests. Dkt. No. 38-2, Larsen Depo. at 76:25-77:10 (attached to Tiberi Decl. at Exh. 2).
22. CAO never asked DenMat for its laser costs prior to signing the Manufacturing Agreement. Casper Depo. at 280:22-281:1 (attached to Tiberi Decl. at Exh. 4); Larsen Depo. at 76:25-77:10 (attached to Tiberi Decl. at Exh. 2); Casper Decl., ¶ 9.	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites.** **Mr. Larsen testified that he does not recall CAO's requests for DenMat's material costs. He did not testify, as DenMat's statement implies, that CAO did not ask for DenMat's material costs prior to signing the Manufacturing Agreement.** Dkt. No. 38-2, Larsen Depo. at 76:25-77:10 (attached to Tiberi Decl. at Exh. 2). **Prior to the parties' settlement of CAO's patent infringement case against DenMat, and their subsequent entry of the Manufacturing Agreement and License Agreement, they had exchanged numerous communications about how CAO could take over manufacturing of DenMat's lasers as a part of the settlement.** Dkt. No. 55-23, CAO

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	Decl. 7/8/19, ¶ 63. **These communications included exchanges of the sale prices that the parties were proposing for the products to be made by CAO, which were dependent on the respective cost information known to the respective parties.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 64. **CAO would send its calculated pricing information to DenMat, which was based on CAO's estimation of its costs to make the products, and request that DenMat respond with DenMat's calculated pricing information, which was based on DenMat's known costs to make the products.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 65. **However, DenMat declined to provide CAO with the information about its known costs at the time the parties were exchanging these communications.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 66. **The parties therefore calculated the final sales prices for the products that CAO was to make based on the calculations from CAO, which were generated based on what it would cost CAO to make the products using its own vendors and components, and which would allow CAO to make a profit**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	from selling the lasers to DenMat. Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 67.
23. CAO's pricing was not based on the actual DenMat lasers it agreed to make; rather, it knowingly evaluated "older" versions of the lasers. Cao Depo. at 80:17-81:16, 82:9-20 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 14:16-15:15, 51:9-25 (attached to Tiberi Decl. at Exh. 2); DEN00630-00631 (attached to Tiberi Decl. at Exh. 10).	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites.** **The testimony cited from Dr. Cao contradicts DenMat's statement. Dr. Cao testified that the SOL laser CAO evaluated was the same product, and that the NV laser CAO evaluated was the same design, having almost exactly the same components.** Dkt. No. 55-5, Kopp Decl. 7/8/19, ¶ 2, Ex. G (Cao Depo. 80:25-81:16). **Rob Larsen's testimony also does not support DenMat's statement. Though Mr. Larsen uses the word "older" when he identifies the lasers in CAO's possession at that time, there is nothing in Mr. Larsen's testimony that indicates the lasers in CAO's possession were different from the lasers CAO would be building under the Manufacturing Agreement.** Dkt. No. 55-44, Kopp Decl. 7/8/19, ¶ 9, Ex. N (Larsen Depo. 50:11-

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	51:25).
24. CAO's laser pricing was based on "somewhat similar articles" for which CAO had "some pricing" information rather than the actual prices for DenMat's lasers. Cao Depo. at 80:17-81:16, 82:9-20 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 14:16-15:15, 51:9-25 (attached to Tiberi Decl. at Exh. 2); DEN00630-00631 (attached to Tiberi Decl. at Exh. 10).	**Undisputed.**
25. CAO did not consider whether the "somewhat similar articles" would satisfy FDA and European Union electrical safety testing under IEC 60601 or other regulatory requirements. Larsen Depo. at 57:9-21 (attached to Tiberi Decl. at Exh. 2).	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites.** **DenMat's statement grossly mischaracterizes the cited witness testimony. Mr. Larsen's testimony explicitly references the testing needed to meet safety standards.** Dkt. No. 55-11, Kopp Decl. 7/8/19, ¶ 9, Ex. N (Larsen Depo. 57:3-21). **He stated that he did not know in September 2017 whether some of the components listed met certain criteria, but nowhere in Mr. Larsen's testimony is there a statement that CAO simply failed to consider whether components would be able to pass safety tests and regulations.**

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26. For its part, DenMat had no knowledge of how CAO estimated CAO's cost to make the lasers. Casper Depo. at 91:13-92:2, 129:21-130:3, 251:2-10 (attached to Tiberi Decl. at Exh. 4); Cao Depo. at 96:4-13 (attached to Tiberi Decl. at Exh. 1); Casper Decl., ¶ 10.	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites.** **DenMat knew that CAO was calculating its cost to make the lasers based on information that would allow CAO to make a profit on each laser sold to DenMat. DenMat further knew that CAO was not calculating its cost to make the lasers based on any intention to use DenMat's existing vendors and components.** **DenMat admits that the objective of the parties was not to enter an agreement that would cause CAO to suffer a loss, but to enter an agreement that was mutually beneficial.** Dkt. No. 55-9, Kopp Decl. 7/8/19, ¶ 7, Ex. L (Cartagena Depo. 161:18-25 to 162:2.). **Therefore, when the parties were negotiating the settlement, DenMat knew that the sale prices CAO agreed to accept for each laser under Section 5.2 of the Manufacturing Agreement ($1,129 for each SOL; $1,029 for each NV) were calculated**

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	to benefit CAO. Dkt. No. 55-6, Kopp Decl. 7/8/19 ¶ 4, Ex. H, § 5.2. (Manufacturing Agreement). **As DenMat also knew at the time the parties were negotiating the settlement, the final sale prices that CAO agreed to accept for each laser it made were lower than the basic costs for DenMat to make each laser, using DenMat's existing vendors and components.** Dkt. No. 58-1, Hoggan Decl., ¶ 2, Ex. 1 (Tiberi E-mail 4/1/19) (ATTORNEYS' EYES ONLY). **Therefore, DenMat knew at the time the parties entered the Manufacturing Agreement that the only way CAO could make money by selling the lasers at the prices set forth in Section 5.2 of the Manufacturing Agreement, was to pay lower costs by using alternative vendors and components, rather than using DenMat's existing vendors and components.**
27. DenMat had no knowledge of CAO's volume buying power for laser components, internal business model, manufacturing efficiency, or any other factors CAO may have considered in negotiating the terms of the contract. Casper Depo. at 91:13-92:2, 129:21-130:3, 251:2-10 (attached to Tiberi	**Disputed that DenMat had no knowledge of "any other factors CAO may have considered in negotiating the terms of the contract." See above Response to DenMat's Statement of Fact No. 26, incorporated here as**

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Decl. at Exh. 4); Cao Depo. at 96:4-13 (attached to Tiberi Decl. at Exh. 1); Casper Decl., ¶ 10.	**though set forth in full.** **This statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence it cites.** **DenMat also knew that CAO was negotiating the terms of both the Manufacturing Agreement and the License Agreement as a settlement of CAO's valid, pending claims against DenMat for infringing on CAO's patents, and that the primary reason CAO was willing to enter a manufacturing relationship with DenMat was because DenMat had represented that it could not afford to pay CAO the full amount of the reasonable royalty that CAO anticipated receiving as a judgment award against DenMat.** Dkt. No. 55-23, Cao Decl. 7/8/19, ¶ 7.
28. CAO could have performed under the Manufacturing Agreement by making DenMat's lasers using DenMat's components and vendors— but chose not to because of pricing. Cao Depo. at 92:12-21 (attached to Tiberi Decl. at Exh. 1).	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites. DenMat's statement mischaracterizes the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
	cited witness testimony, which contradicts DenMat's statement. **Dr. Cao did not testify that CAO "chose not to" make lasers using only DenMat's existing vendors and components "because it wanted to make more money." Dr. Cao testified that CAO would have been able to build the lasers using only DenMat's existing components if the price were different.** Dkt. No. 55-5, Kopp Decl. 7/8/19, ¶ 2, Ex. G (Cao Depo. at 92:12-21). **When DenMat suddenly refused to consider or approve any alternative vendors or components, CAO was not faced with the prospect of making a lower amount of money under the Manufacturing Agreement. CAO was faced with the prospect of suffering a loss on every laser it made under the Manufacturing Agreement.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 35. **CAO would never have settled its patent infringement case against DenMat and entered the Manufacturing Agreement if the deal was to have CAO manufacture lasers for DenMat at a loss on each laser CAO made.** Dkt. No. 55-

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	23, CAO Decl. 7/8/19, ¶ 36. **DenMat knew at this time, and had known from the time the parties settled the patent infringement case and entered the Manufacturing Agreement, that CAO would suffer a loss on every laser produced under the Manufacturing Agreement if it was forced to use only DenMat's existing vendors and components. The final sale prices that CAO agreed to accept for each laser it made, set forth in Section 5.2 of the Manufacturing Agreement, were lower than the basic costs for DenMat to make each laser, using DenMat's existing vendors and components. DenMat admits that as of October 2017, its costs to make each laser, using DenMat's existing vendors and components, were higher than the prices set forth in Section 5.2 of the Manufacturing Agreement.** Dkt. No. 55-6, Kopp Decl. 7/8/19, ¶ 4, Ex. H, § 5.2 (Manufacturing Agreement); Dkt. No. 58-1, Hoggan Decl., ¶ 2, Ex. 1 (Tiberi E-mail 4/1/19) (ATTORNEYS' EYES ONLY). **DenMat later expressly acknowledged that CAO would suffer a loss if DenMat failed to approve alternative vendors and components, stating "the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	product pricing in the [Manufacturing Agreement] would result in a net loss for CAO if the product was built using the existing inventory, and or inventory from the existing suppliers at the current component pricing." Dkt. No. 38-9, CAO 002861-002862 (attached to Tiberi Decl. at Exh. 9). **DenMat further admits that the Manufacturing Agreement does not contain language requiring that DenMat's products must be made with only DenMat's 'existing' components from DenMat's 'existing' suppliers, essentially admitting that its representations to CAO on this point were false.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 257:7-24). **In reality, Section 9.5 of the Manufacturing Agreement does not require that CAO only use DenMat's existing vendors and components to make the products, but allows CAO to make changes, with DenMat's approval.** Dkt. No. 55-6, Kopp Decl. 7/8/19, ¶ 3, Ex. H, § 9.5 (Manufacturing Agreement).
29. Dr. Cao admitted this at deposition: Q. Was CAO Group able to build SOLs and NVs using Den-Mat's components?	**Undisputed.**

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A. We can – Q. And did those -- sorry. A. -- if the price will be different. Q. Oh, I see. So if the price in Section 5.2 of the manufacturing agreement -- if that price were different, again, we would not be sitting here today; is that fair to say? A. Yes. Cao Depo. at 92:12-21 (attached to Tiberi Decl. at Exh. 1).	
30. Dr. Cao made clear to DenMat, on June 4, 2018 (seven months after contract execution), that CAO would not perform under the Manufacturing Agreement: Q. Okay. Did you say something like, "CAO Group is definitely not able to perform using Den-Mat vendors," in a phone conversation? A. I said CAO -- I definitely said that, "CAO cannot perform using your existing vendors for the agreed price in the agreement." Cao Depo. at 140:22-141:11 (attached to Tiberi Decl. at Exh. 1); Casper Depo. at 269:4- 25 (attached to Tiberi Decl. at Exh. 4); DEN05203 (attached to Tiberi Decl. at Exh. 10).	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites. DenMat's statement mischaracterizes the cited witness testimony from Dr. Cao. DenMat's citation to Mr. Casper's testimony also relies on hearsay.** **Dr. Cao did not testify that he ever said CAO would not perform under the Manufacturing Agreement, as DenMat's citation to his testimony implies. Dr. Cao testified that he told Mr. Casper that CAO could not do so if DenMat refused to approve any alternative vendors or components, as permitted by the Manufacturing Agreement and understood by the parties from the beginning. The testimony is set forth below.**

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	Q. And after these exchanges between you and Mr. Casper, did there come a time when you told Mr. Casper, CAO Group -- something like, "CAO Group definitely is unable to perform using your vendors"? Did you tell him that? A. I think I tell him when we're already in the existing communications, and if we use your manufacturing the product for the contract price, we cannot do it. **Q. Okay. Did you say something like, "CAO Group is definitely not able to perform using Den-Mat vendors," in a phone conversation?** A. I said CAO -- I definitely said that, "CAO cannot perform using your existing vendors for the agreed price in the agreement." Dkt. No. 55-5, Kopp Decl. 7/8/19, ¶ 3, Ex. G (Cao Depo. at 160:5-11). **Mr. Casper's testimony about this call also contradicts DenMat's statement, as he states that Dr. Cao was not repudiating the Manufacturing Agreement, but was actually**

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	promising to enforce the Manufacturing Agreement. This testimony is set forth below: **A. There's a response letter from CAO Group addressing anticipatory repudiation, and there was a subsequent phone call between myself and Dr. Cao, June 4th.** Q. Okay. June 4th? **A. Correct.** Q. What did you talk about with Densen Cao in that phone call? **A. June 4th discussion was the definitely not able to perform. Mostly the conversation was filled with Densen threatening to sue Den-Mat. He was very clear about him getting paid or I'll get my money one way or the other, I don't recall the exact words. I believe that was the phone call where he questioned Todd's ability as an attorney. He said specifically if there's -- if you think we are going to get out of the agreement, we're wrong, he'll get his money one way or the other. And we concluded the call with him saying that he had instructed his team to cease all work on the project until he**

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	heard back on the options presented, which were consistent with the May 16th document related to him doing nothing as it relates to using Den-Mat-approved vendors, or moving forward with his proposal, which was Phase 1, 2 and 3, which had already been rejected out of hand. So Mr. Jones may have responded by retracting or addressing anticipatory repudiation, Densen Cao on June 4th doubled down. Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. at 269:5-270:8). **Thus, testimony shows that even in Mr. Casper's memory of his conversations with Dr. Cao, CAO was not refusing to perform, but consistently representing its intention to enforce its rights under the Manufacturing Agreement, stating that "if you [DenMat] think [you] are going to get out of the agreement, [you're] wrong."** **CAO never refused to perform under the terms of the Manufacturing Agreement.** Dkt. No. 55-23 CAO Decl. 7/8/19, ¶ 33. **Despite DenMat's**

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	interpretation, Section 9.5 of the Manufacturing Agreement does not require that CAO only use DenMat's existing vendors and components to make the products, but allows CAO to make changes, with DenMat's approval. Dkt. No. 55-6, Kopp Decl. 7/8/19, ¶ 3, Ex. H, § 9.5 (Manufacturing Agreement)**.** **DenMat admits that the Manufacturing Agreement does not contain language requiring that DenMat's products must be made with only DenMat's 'existing' components from DenMat's 'existing' suppliers, essentially admitting that its representations to CAO on this point were false.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 257:7-24).
31. CAO reiterated that it will not resume performance unless the Manufacturing Agreement were rewritten to give CAO unilateral rights to redesign DenMat's lasers or increase prices. Cao Depo. at 140:22-141:11 (attached to Tiberi Decl. at Exh. 1); Casper Depo. at 245:22- 246:15, 269:4-25 (attached to Tiberi Decl. at Exh. 4); DEN05203 (attached to Tiberi Decl. at Exh. 10).	**Disputed, but this statement does not raise a genuine dispute of fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment, and it is not supported by the evidence DenMat cites. This statement lacks foundation, and grossly mischaracterizes the cited witness testimony and the cited documents.** **Nowhere in any of the cited evidence is any reference to any 'demand' that the**

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	Manufacturing Agreement be 'rewritten' for any reason. **CAO never refused to perform under the terms of the Manufacturing Agreement, as it is written, or demanded that the Manufacturing Agreement be rewritten.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 33. **DenMat admits that CAO's Proposal to make changes is consistent with the terms of the Manufacturing Agreement, as it is written.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18).
32. The admissible evidence includes Dr. Cao's sworn deposition testimony admitting that he made the statement. Cao Depo. at 140:22-141:11 (attached to Tiberi Decl. at Exh. 1); Casper Depo. at 269:4- 25 (attached to Tiberi Decl. at Exh. 4); DEN05203 (attached to Tiberi Decl. at Exh. 10).	**Undisputed that Dr. Cao testified about statements he made. DenMat's attempts to mischaracterize what Dr. Cao said do not raise genuine disputes of fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment.**
33. [intentionally omitted.]	**No response necessary.**
34. After its June 4, 2018 statement, CAO never resumed its performance under the Manufacturing Agreement. DEN 00275-00276, DEN05202- DEN05208) (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14 ; Casper Decl., ¶ 3; Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4).	**Disputed that either party's performance under the Manufacturing Agreement ceased based on any statement by CAO. DenMat's statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial**

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	Summary Judgment. It mischaracterizes the uncontroverted facts, because it ignores the fact that DenMat purported to terminate the Manufacturing Agreement on June 4, 2018. **The parties ceased performing under the Manufacturing Agreement because DenMat claimed, on June 4, 2018, that it had terminated the Manufacturing Agreement.** Dkt. No. 41-2, CAO Decl. 6/24/19, ¶ 40, Dkt. No. 41.14, Ex. 12 (Tiberi June 4, 2018 Letter (CAO 2852-53).
35. CAO's May 16, 2018 proposal (the "Proposal") demanded that DenMat evaluate and approve some 145 separate new laser components; in effect, CAO insisted it would not make DenMat's lasers—it would make CAO's lasers. CAO 000250-000255 (attached to Tiberi Decl. at Exh. 9).	**Disputed, but this statement does not raise a genuine dispute of material fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment. It is not supported by the evidence it cites, and it is also controverted by the other evidence on record.** **DenMat admits that CAO's proposal was not a "demand" or anything to that effect.** Dkt. No. 51-10, Kopp Decl., ¶ 8, Ex. M (Casper Depo. 225:16-25 to 226:1-17). **DenMat also admits that CAO's Proposal to make changes from DenMat's expensive**

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	components to CAO's less costly components is consistent with the terms of the Manufacturing Agreement, which further contradicts DenMat's statement. Dkt. No. 51-10, Kopp Decl., ¶ 8, Ex. M (Casper Depo. 243:15-18). **Mr. Casper testified on behalf of DenMat that CAO's Proposal "is requesting approval from DenMat to make the associated changes, which is consistent with the manufacturing agreement."** *Id.*
36. The Proposal conditions CAO's performance on a new and condition, that is, allowing CAO to redesign DenMat's lasers as it sees fit. The Proposal states: CAO has determined that the act of assuming manufacturing is simply not economically viable under the terms of continued purchase of parts and materials exactly as DenMat is doing now. For this activity to be profitable, CAO must make some adjustments to the sourcing of components for these products. Cao Depo. at 126:6-127:22 (attached to Tiberi Decl. at Exh. 1); Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4); CAO 000250-000255 (attached to Tiberi Decl. at Exh. 9).	**Disputed, but this statement does not raise a genuine dispute of material fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment. It is not supported by the evidence it cites, and it is also controverted by the other evidence on record.** **There is nothing in any of the testimony or documents cited which supports DenMat's allegation that CAO ever 'conditioned' its performance under the Manufacturing Agreement on anything. CAO's Proposal speaks for itself, and it states numerous times that CAO would not make any changes without DenMat's approval.** Dkt. No. 38-9, CAO 000250-000255 (attached to Tiberi Decl. at Exh. 9).

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	DenMat admits that CAO's Proposal is consistent with the terms of the Manufacturing Agreement, which further contradicts DenMat's statement. Dkt. No. 51-10, Kopp Decl., ¶ 8, Ex. M (Casper Depo. 243:15-18). **Mr. Casper testified on behalf of DenMat that CAO's Proposal "is requesting approval from DenMat to make the associated changes, which is consistent with the manufacturing agreement."** *Id.*
37. DenMat resources required to evaluate for possible approval even a small fraction of the Proposal would be extraordinary. CAO 002922-002935 (attached to Tiberi Decl. at Exh. 9); Larsen Depo. at 115:19-117:4 (attached to Tiberi Decl. at Exh. 2); Casper Decl., ¶ 13.	**Disputed, but this statement does not raise a genuine dispute of material fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment. It is not supported by the evidence cited and it is also contradicted by the other evidence on record.** **The cited document and the testimony from Mr. Larsen does not address DenMat's resources at all. Regardless, this has nothing to do with the issues before the Court on CAO's Motion.**
38. [intentionally omitted].	**No response necessary.**
39. The Proposal is based on CAO "Re-Design Timelines" that set out the tasks and time to complete the Proposal. CAO	**Disputed, but this statement raises no genuine dispute of material fact regarding any**

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002922-002935 (attached to Tiberi Decl. at Exh. 9); Larsen Depo. at 115:19-117:4 (attached to Tiberi Decl. at Exh. 2).	**issue before the Court on CAO's Motion.** **CAO's Proposal was based on DenMat's request that asked CAO submit a formal proposal for switching from DenMat's existing vendors and components to alternative vendors and components.** Dkt. No. 51-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 225:16-24). **DenMat admits that CAO's Proposal is consistent with the terms of the Manufacturing Agreement.** Dkt. No. 51-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18).
40. The Re-Design Timelines showed that CAO's laser do-over would take months (if not years). CAO 002922-002935 (attached to Tiberi Decl. at Exh. 9). 41. DenMat's engineering, regulatory, quality control, and operations teams would be forced to shift from their DenMat responsibilities overseeing some 6,000 different DenMat products to evaluating more than 145 design changes demanded by CAO. Cao Depo. at 64:17-65:10 (attached to Tiberi Decl. at Exh. 1); Casper Decl., ¶ 13.	**Disputed, but this statement does not raise a genuine dispute of material fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment.** **CAO never proposed a "laser do-over".** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 22**. DenMat admits that CAO's Proposal is consistent with the terms of the Manufacturing Agreement.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18).
42. CAO admitted that DenMat would be required to engage its engineering team,	**Undisputed.**

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quality control team, and others to allow CAO to substitute components. Cao Depo. at 123:22-125:4 (attached to Tiberi Decl. at Exh. 1).	
43. CAO conceded that changing a simple electrical laser component requires exacting compliance with a host of regulatory and electrical safety standards. Cao Depo. at 64:17-65:3, 123:25- 125:16 (attached to Tiberi Decl. at Exh. 1); Larsen Depo. at 54:24- 57:13 (attached to Tiberi Decl. at Exh. 2).	**Undisputed.**
44. CAO's only "evidence" is DenMat's consistent acknowledgement, post-execution, that the Manufacturing Agreement did not prohibit CAO from sourcing components from alternative vendors, subject to validation and DenMat's approval, as set forth in Section 9.5 of the Manufacturing Agreement. DEN 01082-01083 (attached to Tiberi Decl. at Exh. 10).	**Undisputed that before DenMat abruptly refused to consider alternative vendors and components, and insisted that CAO should only use DenMat's existing vendors and components and therefore suffer a loss on every laser made, DenMat had maintained a different position: that CAO would be permitted to replace DenMat's existing vendors and components with alternatives.**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
45. CAO failed to resume performance under the Manufacturing Agreement after (if not before) DenMat declined its May 16, 2018 proposal. DEN 00275-00276, DEN05202- DEN05208) (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14; Casper Decl., ¶ 3; Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4).	**Disputed, but this does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment. This statement is not supported by the evidence it cites, and it is contradicted by the other evidence on record.** **According to DenMat, CAO was still requesting information from DenMat, through May 24, 2018, which CAO needed to build the lasers.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 167:24-25 to 168:1-20, 169:16-25 to 170:1-5). **DenMat has also admitted that it did not stop working with CAO under the Manufacturing Agreement until early June 2018.** Dkt. No. 55-9, Kopp Decl. 7/8/19, ¶ 7, Ex. L (Cartagena Depo. at 253:9-15, 254:15-20).
46. On May 24, 2018, Dr. Cao wrote to DenMat's CEO that rather than CAO perform by making DenMat's lasers, "DenMat will pay ongoing royalty for CAO lasers and tip sales per license agreement, it will be 10% of net sales starting Jan. 1, 2018." CAO 002865-002866 (attached to Tiberi Decl. at Exh. 9).	**Disputed, but this does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment. This statement is not supported by the evidence it cites, and it is contradicted by the other evidence on record.** **DenMat's cites no evidence that CAO ever intended to do anything "rather than" perform**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	under the Manufacturing Agreement. DenMat's statement also mischaracterizes the document it cites, which directly contradicts DenMat's statement. **DenMat's statement cites a May 24, 2018 e-mail that Densen Cao sent David Casper, which refers to DenMat's recent decision not to allow CAO to source materials from anywhere but DenMat's existing vendors, and that fact that this would cause CAO to lose money.** Dkt. No. 38-9, CAO 002865-002866 (attached to Tiberi Decl. at Exh. 9). **Dr. Cao's e-mail further refers to CAO's desire to continue performing under the Manufacturing Agreement using alternative vendors, stating: "We believe that our sourcing will provide the same or better specifications as your current vendor."** *Id.* **Dr. Cao then states that, out of respect for DenMat's decision, the "best way to move forward is that DenMat will pay ongoing royalty for lasers and tip sales per license agreement, it will be 10% of net sales starting Jan. 1, 2018. This may be the best and easiest way to move forward."** Dkt No. 38-9, CAO 002865-002866 (attached to Tiberi Decl. at Exh. 9). **Nowhere in Dr.**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	Cao's e-mail is there any statement that CAO intended to do anything "rather than" perform under the Manufacturing Agreement, as DenMat's statement alleges. Dr. Cao's statement is actually a summary recitation of obligations that DenMat owes under the License Agreement. Dkt. No. 55-7, Kopp Decl. 7/8/19, ¶ 4, Ex. I, § 4.2 (License Agreement). **DenMat's citation to this e-mail is also misleading, as DenMat selectively clipped it from a larger e-mail exchange between David Casper and Dr. Cao, and omitted the remainder of the exchange.** Dkt. No. 55-16, Kopp Decl. 7/8/19, ¶ 14, Ex. S (DEN 700-701). **In Dr. Cao's May 30, 2018 follow-up e-mail to Mr. Casper, Dr. Cao again repeats CAO's intention to perform under the terms of the Manufacturing Agreement: "I just want to let you know that it is our intention to provide DenMat with equal or better products with our sourcing. Any changes of vendors will have DenMat approval before proceed the change. I believe that we can have a win-win solution as I proposed."** *Id.*
47. Section 4.3 of the License Agreement	**Undisputed.**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
lists Royalty Exempt Products, including lasers made for DenMat by CAO. DEN 00022-00035 (Section 4.3) (attached to Tiberi Decl. at Exh. 10).	
48. If CAO performed by supplying DenMat lasers, then there would be no royalty owed on those CAO supplied DenMat lasers. DEN 00022-00035 (Section 4.3) (attached to Tiberi Decl. at Exh. 10).	**Disputed, but this statement raises no genuine dispute of material fact regarding any issue before the Court on CAO's Motion for Partial Summary Judgment. DenMat's statement lacks foundation and mischaracterizes the document it cites, the License Agreement.** **Section 4.3 of the License Agreement does not actually support the statement. Section 4.3 of the License Agreement lists certain products which would be exempt from royalties. It does not state that DenMat would not owe royalties to CAO under the License Agreement if CAO performed under the separate Manufacturing Agreement.** Dkt. No. 55-7, Kopp Decl. 7/8/19, ¶ 4, Ex. I, § 4.3 (License Agreement). **Other provisions of the License Agreement directly contradict DenMat's statement.** **Section 10.1 of the License Agreement expressly contemplates that the parties would cooperate to work toward CAO being the manufacturer of DenMat's**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
	products, and that the parties would enter the Manufacturing Agreement. *Id.* at § 10.1. **Section 10.2 of the License Agreement states that the results of any cooperation between the parties with respect to the product development "shall have no effect on this [License] Agreement."** *Id.* at § 10.2. **It is undisputed that the License Agreement is a valid, enforceable contract entered by the parties in November 2017.** Dkt. No 1 (Complaint) at 2:21-27; Dkt. No. 12 (CAO Answer and Counterclaim) at 10:27 – 11:3. **It has not been terminated by either party and neither has challenged its validity in this case.** *See id.* **Accordingly, under Section 9.1 of the License Agreement, it "shall continue until the expiration or unenforceability of the last PATENT (the 'Term')."** Dkt. No. 55-7, Kopp Decl. 7/8/19, ¶ 4, Ex. I, § 9.1 (License Agreement). **Even if the License Agreement had been terminated, Section 9.5 states: "nothing herein shall relieve [DenMat] of its obligations to pay Royalties or to make other payments required hereunder that accrue prior to termination, or to fulfill its surviving obligations under**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
	this Agreement for a period of one (1) year." *Id.* at § 9.5.
49. After CAO's initial repudiation, DenMat engaged in discussions with CAO to try to get CAO to perform from late May into early July 2018—but CAO never agreed to perform. DEN 00275-00276, DEN05202-DEN05208) (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14; Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 3.	**Disputed, but DenMat's statement raises no genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment. The cited evidence for the statement does not support the statement, and the statement is contradicted by the other evidence on record.** **CAO never refused to perform under the terms of the Manufacturing Agreement, or otherwise repudiated the Manufacturing Agreement.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 33. **DenMat also never engaged with CAO on what was actually required under the Manufacturing Agreement. Instead, DenMat refused to approve or even consider any alternative vendors or components, despite the fact that DenMat requested a proposal from CAO for just that information, which proposal DenMat admits is fully consistent with the terms of the Manufacturing Agreement. DenMat then attempted to impose a non-**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	contractual requirement on CAO that CAO must use only DenMat's existing vendors, which DenMat knew would cause CAO to suffer a loss on every product made. Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 225:16-24, 243:15-18, 246:16-25 to 247:1-5; Dkt. No. 55-23 CAO Decl. 7/8/19, ¶ 17; Dkt. No. 55-27, CAO Decl. 7/8/19, Ex. 16; Dkt. No. 55-6, Kopp Decl. 7/8/19, ¶ 4, Ex. H, § 5.2. (Manufacturing Agreement); Dkt. No. 58-1, Hoggan Decl., ¶ 3, Ex. 1 (Tiberi E-mail 4/1/19) (ATTORNEYS' EYES ONLY); Dkt. No. 38-9, CAO 002861-002862 (attached to Tiberi Decl. at Exh. 9). **DenMat admits that the Manufacturing Agreement does not contain language requiring that DenMat's products must be made with only DenMat's 'existing' components from DenMat's 'existing' suppliers, essentially admitting that its representations to CAO on this point were false.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 257:7-24). **DenMat admits that CAO's Proposal to make changes away from DenMat's existing vendors and components is consistent with the terms of**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	the Manufacturing Agreement. Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18). **DenMat also admits that the parties' understanding from the beginning was that CAO would be sourcing non-critical components from alternative vendors, and that it would have been possible to swap out critical components of its lasers, as well as non-critical components.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 57:23-58:3, 59:13-19); Dkt. No. 55-9, Kopp Decl. 7/8/19, ¶ 7, Ex. L (Cartagena Depo. 198:17-19). **However, DenMat suddenly decided to change its position later, and attempt to impose a condition that it admits is not contained in the Manufacturing Agreement, stating that "we need our lasers made with existing components from existing suppliers."** Dkt. No. 55-27, CAO Decl. 7/8/19, ¶ 43, Ex. 16. **DenMat later used CAO's resistance to accepting a loss to justify its claim that DenMat could terminate the Manufacturing Agreement based on alleged "repudiation", walk away from its settlement agreement**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
	with CAO, continue to make products using CAO's patents under an alleged "royalty-free" license, and enjoy perpetual immunity from patent infringement claims by CAO. *See* Dkt. No. 1 (Complaint).
50. DenMat attempted to resolve the impasse created by CAO's repudiation by discussing the impasse with CAO between May and July 2018. DEN 00275-00276, DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14; Casper Decl., ¶ 3.	***See* CAO's Response to DenMat's above Statement of Fact No. 49, incorporated here as though set forth in full.**
51. Those attempts proved futile. Casper Decl., ¶ 3.	***See* CAO's Response to DenMat's above Statement of Fact No. 49, incorporated here as though set forth in full.**
52. Section 7.1 requires CAO to DEN 00001-00021 (Section 7.1) "provide these quantities of Products in the Initial Purchase Order [namely, $724,000 worth of SOL lasers, NVPro3 lasers, and laser tips] at no cost to DenMat." (attached to Tiberi Decl. at Exh. 10); Cao Depo. at 48:23-49:24, 156:16-23 (attached to Tiberi Decl. at Exh. 1).	**Undisputed that CAO would have been obligated to deliver products to DenMat under an Initial Purchase Order that complied with the terms of the Manufacturing Agreement, which DenMat never issued.**
53. Though it kept DenMat's $200,000, CAO never provided any Products under the Initial Purchase Order to DenMat, and therefore it breached Section 7.1. Hult (Second) Depo. at 78:22-80:3 (attached to Tiberi Decl. at Exh. 8); Cao Depo. at 110:4-111:8 (attached to Tiberi Decl. at Exh. 1); Casper Decl., ¶ 4.	**Undisputed that CAO kept DenMat's first payment, in the amount of $200,000, toward the total $800,000 license fee that DenMat owes under the License Agreement. Disputed, to the extent it is implied by this statement, that this payment was made in consideration for delivery of products. This**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	statement raises no genuine dispute of material fact regarding any issue before the Court on CAO's Motion for Summary Judgment. The statement is not supported by the evidence it cites, and it is contradicted by the evidence on record. **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO in consideration for the license that CAO granted to DenMat under the License Agreement.** Dkt. No 55-7, Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1. **The Manufacturing Agreement says nothing about any of DenMat's payments of the License Issue Fee or any other obligation that DenMat owes under the License Agreement.** Dkt. No 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement). **Neither the License Agreement nor the Manufacturing Agreement condition DenMat's obligation to make the first payment of $200,000, toward the total $800,000 owed for the license, on delivery of any products by CAO.**

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54. CAO wrote to DenMat on May 16, 2018: "For this activity to be profitable, CAO must make some adjustments to the sourcing of components for these products." Cao Depo. at 126:6-127:6 (attached to Tiberi Decl. at Exh. 1); CAO 000250-000255 (attached to Tiberi Decl. at Exh. 9); DEN 00704 (attached to Tiberi Decl. at Exh. 10).	**Undisputed that this selected quote is set forth in the proposal that CAO provided to DenMat on May 16, 2018, which CAO provided at DenMat's request.**
55. After DenMat declined the Proposal, CAO failed to resume performance under the Manufacturing Agreement. DEN 00275-00276, DEN05202- DEN05208 (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14 ; Casper Decl., ¶ 3.	**Disputed, but this does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment. This statement is not supported by the evidence it cites, and it is contradicted by the other evidence on record.** **According to DenMat, CAO was still requesting information from DenMat, through May 24, 2018, which CAO needed to build the lasers.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 167:24-25 to 168:1-20, 169:16-25 to 170:1-5). **DenMat has also admitted that it did not stop working with CAO under the Manufacturing Agreement until early June 2018.** Dkt. No. 55-9, Kopp Decl. 7/8/19, ¶ 7, Ex. L (Cartagena Depo. at 253:9-15, 254:15-20). **The parties ceased performing under the Manufacturing Agreement because DenMat claimed, on June 4, 2018, that it had terminated the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	Manufacturing Agreement. Dkt. No. 41-14, CAO Decl. 6/24/19, ¶ 40, Ex. 12 (Tiberi June 4, 2018 Letter (CAO 2852-53).
56. DenMat's CEO confirmed that he understood that "D.O.A." meant CAO would not honor the Manufacturing Agreement. Casper Depo. at 262:21-263:6; 285:13-286:4 (attached to Tiberi Decl. at Exh. 4).	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment. It is also contradicted by the other evidence on record.** **Mr. Casper, DenMat's appointed representative under Rule 30(b)(6), admits that he does not understand what Dr. Cao was thinking, or what he meant, when he said "D.O.A." and that he "has no idea what that means" to Dr. Cao.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 263:1-25 to 264:1).
57. CAO at no time nullified or revoked its multiple repudiations. DEN 00275-00276, DEN05202- DEN05208 (attached to Tiberi Decl. at Exh. 10); Cartagena Depo. at 254:4-255:14; Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4); Casper Decl., ¶ 3.	**Disputed. This is not a statement of fact, it is DenMat's legal argument. This statement raises no genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment.**
58. After its June 1, 2018 letter, CAO reiterated its repudiation and increased its threats to DenMat. DEN05202-DEN05208 (attached to Tiberi Decl. at Exh. 10); Casper Decl., ¶ 3; Casper Depo. at 245:22-246:15	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
(attached to Tiberi Decl. at Exh. 4).	**Summary Judgment. The statement is not supported by the evidence it cites, and it is also contradicted by the other evidence on record.** **According to the testimony and notes from David Casper, DenMat's appointed representative under Rule 30(b)(6), during the referenced communications he exchanged with Dr. Cao, Dr. Cao did not repudiated the Manufacturing Agreement, but promised to enforce it and expressed CAO's desire to continue working under the terms of the Manufacturing Agreement.** **Mr. Casper testified that during his conversations with Dr. Cao, Dr. stated that Mr. Casper was wrong if he thought that DenMat was going to "get out of the agreement."** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. at 269:5-270:8). **According to Mr. Casper's notes from his conversations with Dr. Cao, Dr. Cao made multiple statements about CAO's intention to hold DenMat to the terms of the Manufacturing Agreement, and restated CAO's desire to work with DenMat under the terms of the Manufacturing Agreement.** Dkt. No. 55-22,

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
	Kopp Decl. 7/8/19, ¶ 23, Ex. Y (DEN 05203).
59. CAO never took any steps toward resuming performance, such as resuming the validation protocol for DenMat's lasers, issuing purchase orders for laser parts from DenMat's suppliers, resuming communications with DenMat's manufacturing team, or revoking its ultimatum to increase prices, choose suppliers, and redesign the lasers. DEN 00275-00276, DEN05202- DEN05208 (attached to Tiberi Decl. at Exh. 10); Casper Depo. at 245:22-246:15 (attached to Tiberi Decl. at Exh. 4); Cartagena Depo. at 254:4-255:14 (attached to Tiberi Decl. at Exh. 6); Casper Decl., ¶ 3.	**Undisputed that after DenMat purported to terminate the Manufacturing Agreement on June 4, 2018, CAO did not continue performing. Disputed that CAO ever gave DenMat an "ultimatum" of any kind. DenMat's statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial Summary Judgment. It is not supported by the evidence cited, and it is contradicted by the other evidence on record.** **CAO never issued an ultimatum to DenMat.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 11. **CAO proposed alternative vendors and components and requested DenMat's approval under Section 9.5 of the Manufacturing Agreement, and DenMat admits that CAO's proposal was consistent with the terms of the Manufacturing Agreement.** Dkt. No. 55-10, Kopp Decl. 7/8/19, ¶ 8, Ex. M (Casper Depo. 243:15-18).
60. DenMat's damages include, but are not limited to, its loss of $200,000 it paid to CAO, for which it never received anything of value; lost profits expected from the transfer of its laser manufacturing to CAO;	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion for Partial**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
loss of thirty thousand dollars of free laser components it gave to CAO; labor and other expenses incurred over a seven-month period trying to get CAO to perform under the Manufacturing Agreement; its attorneys fees; and all other relief deemed appropriate by the Court. Casper Decl., ¶ 4; Casper 238:20- 239:10; 296:23-297:1 (attached to Tiberi Decl. at Exh. 4).	**Summary Judgment. DenMat has failed to present any admissible evidence that supports its damage claims.** **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO, including the first payment of $200,000, in consideration for the license that CAO granted to DenMat under the License Agreement, not for any obligation under the separate Manufacturing Agreement.** Dkt. No. 55-7, Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1. **DenMat has presented no evidence supporting the other damage claims it raises for the first time in response to CAO's Motion for Partial Summary Judgment. DenMat did not disclose these damage claims, or any evidence to support them, in its Initial Disclosures in this case or in any subsequent disclosure or production.** Kopp Decl., ¶ 3, Ex. Z (DenMat Initial Disclosures).
61. CAO demanded that DenMat issue the Initial Purchase Order as a condition for CAO to consider buying laser components. Cartagena Depo. at 183:18-184:8 (attached to Tiberi Decl. at Exh. 6).	**Disputed, but this statement does not raise a genuine dispute of material fact regarding any issue before the Court on CAO's Motion. This statement**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	is not supported by the testimony it cites. **The testimony cited from Robert Cartagena does not say that CAO ever demanded that DenMat issue the Initial Purchase Order, as it is defined in Section 7.1 of the Manufacturing Agreement.** Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 7.1. **DenMat admits that because the parties never completed the manufacturing logistics phase of their work together, the Initial Purchase Order was not due, and questions around its timing are "irrelevant."** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), admits that the manufacturing logistics phase was not completed because the parties did not complete the process validation. He testified: "As it clearly states in Section 7.1, the initial purchase order is to be issued after the manufactured initial logistics were completed, which includes process validation to your point, and we had not gotten there yet."** Dkt. No. 41-16, Kopp Decl. 6/24/19 (Casper Depo. 153:24-154:3).

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62. After CAO received DenMat's Initial Purchase Order, its Vice President of Operations wrote to DenMat: "Thank you for sending over your PO's." CAO 002694 (attached to Tiberi Decl. at Exh. 9).	**Undisputed. The cited e-mail further states that because DenMat still had not provided CAO with information that CAO needed to build the lasers, CAO would not be able to deliver finished products to DenMat by the due dates in the purchase orders.**
63. As a matter of commercial reality, for purposes of inventory control, supply chain, and cash flow, it is standard for a buyer to issue purchase orders for manageable quantities of products to be delivered over time, which is what DenMat did. Casper Depo. at 158:18-25 (attached to Tiberi Decl. at Exh. 4).	**Undisputed, immaterial to this case and the issues before the Court on CAO's Motion. What is "standard" has nothing to do with the specific requirements for the "Initial Purchase Order" at issue in this case, which is a defined term in the Manufacturing Agreement.**
64. The Initial Purchase Order was comprised of six pages and timely was issued by DenMat for the quantities of products set forth in Section 7.1 of the Manufacturing Agreement. CAO 002676-002684 (attached to Tiberi Decl. at Exh. 9); DEN 00001-00021 (Section 7.1) (attached to Tiberi Decl. at Exh. 10).	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion. DenMat's statement is not supported by the evidence it cites, and is contradicted by the evidence on record.** **It is undisputed that DenMat did not send a single purchase order which meets the definition of the "Initial Purchase Order" under Section 7.1 of the Manufacturing Agreement.** Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement)

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	§ 7.1. **Instead, DenMat issued six separate purchases orders for varying quantities of products to be due at a range of times.** Dkt. No. 55-24, CAO Decl. 7/8/19, ¶ 13, Ex. 13. **It is further undisputed that the Manufacturing Agreement required that the Initial Purchase Order would be issued after the parties completed manufacturing logistics**. Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 7.1. **However, DenMat admits that the parties never completed manufacturing logistics because they never completed the process validation.** **David Casper, DenMat's Chief Executive Officer and appointed representative under Rule 30(b)(6), testified: "As it clearly states in Section 7.1, the initial purchase order is to be issued after the manufactured initial logistics were completed, which includes process validation to your point, and we had not gotten there yet."** Dkt. No. 41-16, Kopp Decl. 6/24/19 (Casper Depo. 153:24-154:3).
65. CAO nowhere alleges that it was damaged by DenMat's issuance of its Initial	**Disputed, but this statement does not raise a genuine dispute**

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Purchase Order and it never fulfilled any purchase order. Hult (Second) Depo. at 78:22- 80:3 (attached to Tiberi Decl. at Exh. 8); Cao Depo. at 110:4- 111:8 (attached to Tiberi Decl. at Exh. 1); Casper Decl., ¶ 4.	**of material fact regarding the issues before the Court on CAO's Motion.** **DenMat never issued the "Initial Purchase Order", for the reasons addressed in CAO's above response to DenMat's Statement of Fact. No. 64.**
66. CAO had not provided the proposed tooling design to DenMat, which would have had to verify that the proposed tooling design could be used to make its existing tips. Casper Decl., ¶ 5.	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion. The statement is contradicted by the evidence on record.** **Section 3.1 of the Manufacturing Agreement requires DenMat to pay for any necessary tooling.** Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 3.1. Section 3.1 does not contain any language conditioning DenMat's obligation under this provision on a requirement that CAO had to submit a design which DenMat "had to verify." *Id.*
67. DenMat could not have "approved" the invoice without specifications for the proposed tooling. CAO's providing the Casper Decl., ¶ 5.	***See* above Response to DenMat's Statement of Fact No. 66, incorporated here as though set forth in full.**
68. CAO admitted it never ordered or paid for the tooling. CAO's Responses to	**Undisputed. When DenMat refused to pay for the tooling,**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
DenMat's First Set of Requests for Admissions, Nos. 18, 19, and 20 (attached to Tiberi Decl. at Exh. 11).	**CAO mitigated its damages.**
69. The parties were in constant contact regarding DenMat's existing component inventory. CAO 002685-CAO 002693; CAO 000005, 00007-000008, 000019- 000022 (attached to Tiberi Decl. at Exh. 9).	**Undisputed.**
70. Because CAO's failure threatened to disrupt DenMat's ability to supply lasers to its customers, the parties discussed CAO's purchase of DenMat's existing component inventory. CAO 002685-CAO 002693; CAO 000005, 00007-00008, 000019- 000022 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6).	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion. None of the documents and testimony cited by DenMat supports this statement, and the evidence on record contradicts it.** **None of the evidence cited suggests that the parties' discussion about DenMat's existing inventory had anything to do with DenMat's ability to supply lasers to customers. None of the evidence cited supports the suggestion there was any such threatened 'disruption,' or that anything CAO did could have caused one.** **The parties had to discuss DenMat's existing inventory because of the express terms of the Manufacturing Agreement. In the event that DenMat decided to exercise its option to require CAO to purchase its existing inventory under**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	Section 4.2 of the Manufacturing Agreement, CAO would be prohibited from purchasing components from any other source until DenMat's existing inventory was exhausted. Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 4.2. **CAO was therefore unable to order any components from alternative sources, without risking a breach of Section 4.2 of the Manufacturing Agreement, until DenMat decided whether or not it was going to exercise the option under Section 4.2, and advised CAO accordingly.** *Id.*; Dkt. No. 41-2, CAO Decl. 6/24/19, ¶ 13.
71. In early February 2018, DenMat provided to CAO a list of all "available inventory that CAO could, at its option, buy from [DenMat], if it felt it needed to, in order to get through validation." CAO 002685-CAO 002693; CAO 000005, 00007-00008, 000019-000022 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6); Casper Decl., ¶ 22.	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion. None of the documents and testimony cited by DenMat supports this statement, and the evidence on record contradicts it.** **As the cited e-mails show, at this point in the parties' communications about DenMat's existing inventory, DenMat refused to allow CAO to purchase components from DenMat's existing inventory the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	fair market price, even though the fair market price was lower than what DenMat wanted to charge CAO for these components. **The evidence is also uncontroverted that it was DenMat's option, not CAO's, under Section 4.2 of the Manufacturing Agreement, to require CAO to purchase components from DenMat's existing inventory before CAO could purchase components from any other sources.** Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 4.2. **DenMat admits that it never told CAO one way or the other whether DenMat intended to exercise its option under Section 4.2.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 9; Dkt. No. 41-17, Kopp Decl. 6/24/19, ¶ 6, Ex. B (Cartagena Depo. 113:11-25 to 115:5-18). **Finally, as DenMat states in its Statement of Fact No. 60, contained herein, DenMat gave CAO the components to build the validation lasers. CAO was not purchasing parts to build the validation lasers.**
72. Also in February 2018, DenMat provided a spreadsheet with a list of all components, quantities, open purchase	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the**

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orders for future deliveries, and prices for all components—all available for CAO to purchase at any time. CAO 002685-CAO 002693; CAO 000005, 00007-00008, 000019- 000022 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6); Casper Decl., ¶ 22.	**issues before the Court on CAO's Motion. None of the documents and testimony cited by DenMat supports this statement, and the evidence on record contradicts it.** **DenMat did not make its existing inventory "available for CAO to purchase at any time," as the statement suggests. Rather than make the components in its existing inventory available for CAO to purchase under the terms of the Section 4.2 of the Manufacturing Agreement, DenMat refused to allow CAO to purchase these components at the lower fair market price, but instead attempted to persuade CAO to pay a negotiated "middle ground" price. DenMat ultimately never exercised the option anyway.** Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 9; Dkt. No. 55-9, Kopp Decl. 7/8/19, ¶ 7, Ex. L (Cartagena Depo. 113:11-25 to 115:5-18); Dkt. No. 55-15, Kopp Decl. 7/8/19, ¶ 14, Ex. R (DEN 2870). Dkt. No. 55-6, Kopp Decl. 7/8/19, Ex. H (Manufacturing Agreement) § 4.2. **According to DenMat's own recorded communications on this point, CAO asked DenMat to tell CAO whether DenMat**

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	intended to exercise its option under Section 4.2 of the Manufacturing Agreement. In it, DenMat's Chief Operating Officer, Robert Cartagena, stated: "The CAO Group simply wants to know whether or not we will exercise our option and if so, what items and what quantities we will be selling." Dkt. No. 41-20, Kopp Decl. 6/24/19, ¶ 9, Ex. E.
73. CAO was given the opportunity by DenMat to purchase any or all of DenMat's entire component inventory at any time; it chose not to. CAO 002685-CAO 002693; CAO 000005, 00007-00008, 000019-000022 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6); Casper Decl., ¶ 22.	***See* above Response to DenMat's Statement of Fact No. 72, incorporated herein as though set forth in full.**
74. CAO's suggestion that DenMat refused to provide information or prevented it from buying from other sources is false. CAO 002685-CAO 002693; CAO 000005, 00007-000008, 000019- 000022 (attached to Tiberi Decl. at Exh. 9); Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6); Casper Decl., ¶ 22.	***See* above Response to DenMat's Statement of Fact No. 72, incorporated herein as though set forth in full.** **CAO was unable to order any components from alternative sources, without risking a breach of Section 4.2 of the Manufacturing Agreement, until DenMat decided whether or not it was going to exercise the option under Section 4.2, and advised CAO accordingly.** *Id.*; Dkt. No. 41-2, CAO Decl. 6/24/19, ¶ 13. **DenMat admits that it never sent CAO any**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	communication indicating whether or not it intended to exercise its option under Section 4.2 of the Manufacturing Agreement. Dkt. No. 41-17, Kopp Decl. 6/24/19, ¶ 6, Ex. B (Cartagena Depo. 113:11-25 to 115:5-18).
75. DenMat's willingness to sell CAO its components, at a loss to DenMat, rather than haggle over price, was caused by CAO's failure to initiate, let alone maintain, a supply chain, for the manufacture of DenMat's lasers. Cartagena Depo. at 116:3-118:12 (attached to Tiberi Decl. at Exh. 6).	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the issues before the Court on CAO's Motion. None of the documents and testimony cited by DenMat supports this statement, and the evidence on record contradicts it.** **Was not willing to sell CAO its components, per the requirements of Section 4.2 of the Manufacturing Agreement. CAO repeatedly requested that DenMat tell CAO whether DenMat intended to exercise its option under Section 4.2, and if so, to please provide CAO with the cost information for the items DenMat wished to sell to CAO from its existing inventory, so that the parties could determine whether CAO would pay: DenMat's material cost plus 4%, or the fair market price, whichever is less. When CAO presented DenMat with information showing that the fair market price for the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	Defendant's Facts and Supporting Evidence
	components was lower than DenMat's material costs, DenMat attempted to persuade CAO to pay a negotiated "middle ground" price, rather than the lower fair market price, but DenMat ultimately never exercised the option. Dkt. No. 55-23, CAO Decl. 7/8/19, ¶ 9; Dkt. No. 55-9, Kopp Decl. 7/8/19, ¶ 7, Ex. L (Cartagena Depo. 113:11-25 to 115:5-18); Dkt. No. 55-15, Kopp Decl. 7/8/19, ¶ 14, Ex. R (DEN 2870). **CAO was unable to order any components from alternative sources, without risking a breach of Section 4.2 of the Manufacturing Agreement, until DenMat decided whether or not it was going to exercise the option under Section 4.2, and advised CAO accordingly.** *Id.*; Dkt. No. 41-2, CAO Decl. 6/24/19, ¶ 13. **DenMat admits that it never sent CAO any communication indicating whether or not it intended to exercise its option under Section 4.2 of the Manufacturing Agreement.** Dkt. No. 41-17, Kopp Decl. 6/24/19, ¶ 6, Ex. B (Cartagena Depo. 113:11-25 to 115:5-18).
76. CAO's Vice President of Products acknowledged that "the whole point" of the Manufacturing Agreement was for CAO to	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the**

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continue to buy from DenMat's vendors the same laser components DenMat was buying so that the process of buying the same components "would remain unaffected." Larsen Depo. at 62:5-18 (attached to Tiberi Decl. at Exh. 2); CAO 002136 (attached to Tiberi Decl. at Exh. 9).	**issues before the Court on CAO's Motion. None of the documents and testimony cited by DenMat supports this statement, and the evidence on record contradicts it.** **DenMat grossly misstates the cited testimony from Rob Larsen and the cited e-mail. Mr. Larsen made no sweeping statements about the "whole point of the Manufacturing Agreement," as DenMat's statement suggests. Mr. Larsen's cited testimony regards an e-mail he sent about a single component, a battery.** **DenMat has admitted that from the early stages of CAO's and DenMat's work together under the Manufacturing Agreement, the parties understood that CAO would be permitted to source components from vendors other than DenMat's existing vendors, and the parties discussed this openly.** Dkt. No. 41-16, Kopp Decl. 6/24/19, ¶ 5, Ex. A (Casper Depo. 57:23-25 to 58:1-3, 59:13-19); Dkt. No. 41-17Kopp Decl. 7/8/19, ¶ 6, Ex. B (Cartagena Depo. 55:4-11).
77. CAO never delivered anything of value to DenMat. Hult (Second) Depo. at 78:22-80:3 (attached to Tiberi Decl. at Exh. 8);	**Disputed, but this statement does not raise a genuine dispute of material fact regarding the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
Cao Depo. at 110:4-111:8 (attached to Tiberi Decl. at Exh. 1); Casper Decl., ¶ 4.	**issues before the Court on CAO's Motion. None of the documents and testimony cited by DenMat supports this statement, and the evidence on record contradicts it.** **David Casper, DenMat's appointed representative under Rule 30(b)(6), admitted that when CAO made lasers for the validation process that passed DenMat's inspection, those would be "sellable units" that DenMat could "put into finished goods in an unquarantined fashion and sold."** Dkt. No. 41-16, Kopp Decl. 6/24/19, ¶ 5, Ex. A (Casper Depo. 134:19-21, 198:17-25). **It is uncontroverted that CAO made lasers during the process validation and delivered them to DenMat, whereupon those lasers passed DenMat's inspection.** Dkt. No. 55-30, CAO Decl. 7/8/19, ¶ 49, Ex. 19 (CAO 000097). **By DenMat's own definition of "sellable" lasers, CAO clearly delivered lasers that were "of value" to DenMat.**
78. CAO supplied nothing of value to DenMat in exchange for DenMat's $200,000 initial payment. Hult (Second) Depo. at 78:22-80:3 (attached to Tiberi Decl. at Exh. 8); Cao Depo. at 110:4-111:8 (attached to Tiberi Decl. at Exh. 1); Casper Decl., ¶ 4.	**Disputed, but this statement raises no genuine dispute of material fact regarding the issues before the Court on CAO's Motion. It is not supported by the evidence it cites, and is contradicted by the**

Plaintiff's Uncontroverted Facts and Supporting Evidence	**Defendant's Facts and Supporting Evidence**
	other evidence on record. **Section 4.1 of the License Agreement expressly states that DenMat was to pay the $800,000 License Issue Fee to CAO in consideration for the license that CAO granted to DenMat under the License Agreement.** Dkt. No. 55-7, Kopp Decl. 7/8/19, Ex. I (License Agreement) § 4.1. **DenMat made the first payment, in the amount of $200,000, toward the total $800,000 it owes, in exchange for CAO granting DenMat a license to use CAO's patents.**
79. According to CAO's documents produced in discovery, CAO spent a total of $240.00 on components for DenMat's lasers, which was for paper labels and brochures that cost between 13 and 22 cents each. CAO 002897 (attached to Tiberi Decl. at Exh. 9).	**Disputed, but this statement raises no genuine dispute of material fact regarding the issues before the Court on CAO's Motion.** ***See* above Response to DenMat's Statement of Fact No. 74, incorporated herein as though set forth in full.**

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Date: July 15, 2019

Respectfully submitted,

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